BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario Human Rights Code, 1981, S.O. 1981, c. 53, as amended;

AND IN THE MATTER OF the complaints by G. Michael Roosma and Robert Weller dated August 29, 1985 and September 5, 1985 respectively, and amended October 31, 1986, alleging discrimination in employment on the basis of creed and constructive discrimination by Ford Motor Company of Canada Ltd and The National Automobile and Agricultural Implement Workers of Canada, CAW Local 707.

B E T W E E N :

G. Micheal Roosma
Robert Weller

Complainants

- and -

Ford Motor Company of Canada Ltd.
The National Automobile and Agricultural Implement Workers of Canada
CAW Local 707

Respondents

DECISION

Adjudicator : Peter P. Mercer

Date : July 14, 1995

Board File No: 87-0004/5

Decision No : 95-033

Board of Inquiry (*Human Rights Code*)
150 Eglinton Avenue East
5th Floor, Toronto ON M4P 1E8
Phone (416) 314-0004 Fax: (416) 314-8743
Toll free 1-800-668-3946

BOARD OF INQUIRY DECISION UNDER
THE ONTARIO HUMAN RIGHTS CODE, 1981

IN THE MATTER OF the Human Rights Code, 1981, S.O. 1981, c. 53, as amended.

AND IN THE MATTER OF the complaint made by Mr. G. Michael Roosma alleging discrimination in employment on the basis of creed, and constructive discrimination by Ford Motor Company of Canada Ltd. and The National Automobile and Agricultural Implement Workers of Canada, CAW Local 707.

AND IN THE MATTER OF the complaint made by Robert Weller alleging discrimination in employment on the basis of creed, and constructive discrimination by Ford Motor Company of Canada Ltd. and The National Automobile and Agricultural Implement Workers of Canada, CAW Local 707.

Board of Inquiry:	Peter P. Mercer
Appearances:	D. Lepofsky and T. Bell for the Ontario Human Rights Commission
	L.A. MacLean Q.C. and J. Fyshe for the Respondent CAW Local 707
	R.G. Juriansz and P. Schabas for the Respondent Ford Motor Company of Canada Ltd.

Hearings in this matter were held in Toronto, Ontario

I. BACKGROUND

This has been an extraordinarily long and complex case producing seventy-six volumes of transcript, thousands of pages of exhibits and numerous interim written rulings. The first of these was in response to three preliminary motions made at the commencement of the hearing into these complaints. Because my decision on these motions was appealed by the respondents, and the appeal denied by the Divisional Court on the grounds, described further below, that it was premature, I have chosen to incorporate the substance of the text of my written decision on those preliminary motions.

II. REASONS FOR DECISION ON PRELIMINARY MOTIONS

1. That the Human Rights Code, 1981, S.O. 1981, c. 53, section 10(a) does not Impose a Duty of Reasonable Accommodation.

Section 10 of the Human Rights Code, 1981, provides as follows:

> 10. A right of a person under Part 1 is infringed where a requirement, qualification or consideration is imposed that is not discrimination on a prohibited ground but that would result in the exclusion, qualification or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
>
> (a) the requirement, qualification or consideration is a reasonable and bona fide one in the circumstances; or
>
> (b) it is described in this Act that to discriminate because of such ground is not an infringement of a right.

On behalf of the Ford Motor Company, Mr. Juriansz submitted that a prima facie case of constructive discrimination on the basis of creed, made out under the opening words of section 10, fails if, under section 10(a), "the requirement, qualification or consideration is a reasonable and bona fide one in the circumstances". According to this submission, which was supported by counsel for the respondent Union, that is the end of the matter and section 10(a) imports no duty of reasonable accommodation.

The starting point of the Ford Motor Company's argument on this submission was that the decision of the Supreme Court of Canada in Ontario Human Rights Commission and Theresa O'Malley (Vincent) v. Simpsons Sears Ltd.

[1985] 2 S.C.R. 536 does not apply to the present case. The O'Malley case concerned an appeal by O'Malley against her employer, Simpsons-Sears Limited, alleging discrimination of the basis of creed contrary to the provisions of the legislation in place at the time of the events giving rise to the proceedings. Those provisions, in section 4(1)(g) of the Ontario Human Rights Code, R.S.O. 1980, c. 340, are as follows:

> 4.- (1) No person shall,
>
> . . . .
>
> (g) discriminate against any employee with regard to any term or condition of employment.
>
> because of race, creed, colour, age, sex, marital status, nationality, ancestry, or place of origin of such person or employee.

Mrs. O'Malley had been employed by Simpsons-Sears for approximately seven years when, in October 1978, she became a member of the Seventh-Day Adventist Church. It was a condition of employment that Mrs. O'Malley, a full-time sales clerk, work on Friday evenings on a rotating basis and on two Saturdays out of three. However, a tenet of the Seventh-Day Adventist faith is that its Sabbath, extending from sundown Friday to sundown Saturday, be strictly kept. Consequently, O'Malley took the position that her faith prevented her from working for Simpsons-Sears on Saturdays.

In a unanimous judgment, the Supreme Court of Canada held that O'Malley was discriminated against on the basis of creed. Crucial to this judgment was the Court's finding that it was not necessary to prove that discrimination was intentional to find that a violation of the Ontario Human Rights Code had occurred. An employment condition, made honestly and in good faith and neutral on its face, can still have discriminatory effects and it is this "adverse effect" which is important in determining whether discrimination has occurred.

Having found adverse effect discrimination on the basis of creed, the Supreme Court of Canada had to decide whether O'Malley was automatically entitled to the remedies provided under the Ontario Human Rights Code. Mr. Justice McIntyre, speaking for the Court at p. 552, approached the issue as follows:

> No question arises in a case involving direct discrimination. Where a working rule or condition of employment is found to be discriminatory on a prohibited ground and fails to meet any statutory justification test, it is simply struck down: see the Etobicoke case, supra. In the case of discrimination on the basis of creed resulting from the effect of a condition or rule rationally related to the performance of the job and not on its face discriminatory a different result follows. The working rule or condition is not struck down, but its effect on the complainant must be considered, and if the purpose of the Ontario Human Rights Code is to be given effect some accommodation must be required from the employer for the benefit of the complainant.

His Lordship then referred to a number of American decisions prescribing a duty to accommodate short of undue hardship on the part of the employer. He then concluded, at page 555, that although there was no express statutory basis for such a duty in the Ontario Human Rights Code, the general provisions and intent of the Code imported the requirement that the employer take reasonable steps towards accommodation:

> Accepting the proposition that there is a duty to accommodate imposed on the employer, it becomes necessary to put some realistic limit upon it. The duty in a case of adverse effect discrimination on the basis of religion or creed is to take reasonable steps to accommodate the complainant, short of undue hardship: in other words, to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer. Cases such as this raise a very different issue from those which rest on direct discrimination. Where direct discrimination is shown the employer must justify the rule, if such a step is possible under the enactment in question, or it is struck down. Where there is adverse effect discrimination on account of creed the offending order or rule will not necessarily be struck down. It will survive in most cases because its discriminatory effect is limited to one person or to one group, and it is the effect upon them rather than upon the general work force which must be considered. In such case there is no question of justification raised because the rule, if rationally connected to the employment, needs no justification; what is required is some measure of accommodation. The employer must take reasonable steps towards that end which may or may not result in full accommodation. Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.

The Supreme Court of Canada also found that the onus of proving that accommodation would have resulted in undue hardship was on the employer. As Simpsons-Sears did not call any evidence on the matter, it did not discharge the onus of showing that accommodating O'Malley would have created undue hardship and O'Malley's complaint was upheld.

Counsel for the respondent Company than referred to the decision of the Supreme Court of Canada in K.S. Bhinder and The Canadian Human Rights Commission v. The Canadian National Railway Company [1985] 2 S.C.R. 560. This decision was issued the same day as the O'Malley decision but, unlike O'Malley, it was not unanimous. Reasons for judgment were again given by McIntyre J., with Justices Estey and Chouinard concurring, with concurring reasons by Madame Justice Wilson, Beetz J. concurring and dissenting reasons by Chief Justice Dickson, Lamer, J. concurring. Counsel laid great stress on the fact that in the Bhinder case, where the purpose of the legislation and the interpretive approach were the same as in O'Malley, the Supreme Court of Canada nonetheless reached the opposite conclusion and found no duty to accommodate. This different result was generated by the fact that the statutory provisions were different in the two cases and counsel submits that the provisions of section 10 of the Human Rights Code, 1981 applicable to this case should be interpreted according to the Bhinder rationale.

The Bhinder case arose under the Canadian Human Rights Act, S.C. 1976-77, c. 33. Bhinder was employed as a maintenance electrician with the Canadian National Railway Company in its Toronto coach yard. He had been working for over four years when CN announced that all employees would be required to wear a hard hat while working. Bhinder refused to wear the hard hat on the basis that, as a Sikh, he was forbidden to wear anything on his head except a turban. Consequently, his employment with CN ceased and he filed a complaint under sections 7 and 10 of the Canadian Human Rights Act:

> **7.** It is a discriminatory practice, directly or indirectly,
>
> (a) to refuse to employ or continue to employ any individual, or
>
> (b) in the course of employment, to differentiate adversely in relation to an employee on a prohibited ground of discrimination.
>
> **10.** It is a discriminatory practice for an employer or an employer organization
>
> (a) to establish or pursue a policy or practice, or

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

Of particular importance in the Bhinder case, and to the argument made by counsel for the respondent Company on the preliminary motion in this case, is the following section:

14. It is not a discriminatory practice if

(a) any refusal, exclusion, expulsion, suspension limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement.

The Supreme Court of Canada repeated its finding in O'Malley v. Simpsons-Sears Ltd. that it is not necessary to show an intention to discriminate and concluded that the definitions of discriminatory practices in sections 7 and 10 of the Canadian Human Rights Act extended to both unintentional and adverse effect discrimination. As McIntyre J. put it, at page 586:

> The facts in this case and in that of O'Malley are identical in principle and the only significant difference between the two governing statutes as far as this case is concerned is the presence of s. 14(a) in the Canadian Human Rights Act creating the bona fide occupational requirement defence. The fundamental point then on which this case must turn is the question of whether the hard hat rule is a bona fide occupational requirement and, if so, what effect must be given to s. 14(a) of the Act?

The Court also rejected the appellants' contention that the test should be applied on an individual basis so that satisfaction of the test would depend on the particular characteristics of the individual complainant and the special circumstances of the case. At page 589, McIntyre J. stated the following:

> It was said in Etobicoke that the rule under The Ontario Human Rights Code was non-discrimination, while the exception was discrimination. This is equally true of the Canadian Human Rights Act. The Tribunal was of the opinion that a liberal interpretation should be applied to the provisions prohibiting discrimination and a narrow interpretation to the exceptions. Accepting this as correct, it is nevertheless to be observed that where s. 14(a) applies, the subsection in the clearest and

most precise terms says that where the bona fide occupational requirement is established, it is not a discriminatory practice. To conclude then that an otherwise established bona fide occupational requirement could have no application to one employee, because of the special characteristics of that employee, is not to give s. 14(a) a narrow interpretation; it is simply to ignore its plain language. To apply a bona fide occupational requirement to each individual with varying results, depending on individual differences, is to rob it of its character as an occupational requirement and to render meaningless the clear provisions of s. 14(a).

Finally, his Lordship summarized the differences between the O'Malley and Bhinder cases, at page 590:

> I cannot, however, leave this case, without further reference to the case of O'Malley. On facts for all purposes identical to those at bar, Mrs. O'Malley has received protection from the religious discrimination against which she complained and Bhinder was not. The difference in the two cases results from the difference in the two statutes. The Ontario Human Rights Code in force in the O'Malley case prohibited religious discrimination but contained no bona fide occupational requirement for the employer. The Canadian Human Rights Act contains a similar prohibition, but in s. 14(a) is set out in the clearest terms the bona fide occupational requirement defence. As I have already said, no exercise in construction can get around the intractable words of s. 14(a) and Bhinder's appeal must accordingly fail. It follows as well from the foregoing that there cannot be any consideration in this case of the duty to accommodate referred to in O'Malley and contended for by the appellants. The duty to accommodate will arise in such a case as O'Malley, where there is adverse effect discrimination on the basis of religion and where there is no bona fide occupational requirement defence. The duty to accommodate is a duty imposed on the employer when the employee has suffered of will suffer discrimination from a working rule or condition. The bona fide occupational requirement defence set out in s. 14(a) leaves no room for any such duty for, by its clear terms where the bona fide occupational requirement exists, no discriminatory practice has occurred. As framed in the Canadian Human Rights Act, the bona fide occupational requirement defence when established forecloses any duty to accommodate.

Counsel for the respondent Company, supported by counsel for the respondent Union, advanced the view that section 14(a) of the Canadian Human Rights Act was treated in the Bhinder case, not as a defence to discrimination nor as an exception but as part of the very definition of discrimination. Consequently, it was submitted, following the Etobicoke principle set out above, section 14(a) was found to be deserving of the same large liberal interpretation as the rest of the statute. Likewise, the respondents argue, section 10(a) of the Ontario Human Rights Code 1981 should be construed as part of the definition of constructive discrimination and not as an exception or defence. Such a construction, it was submitted, would yield the result that section 10(a) does not impose a duty of reasonable accommodation on either respondent.

A number of points were raised in support of this proposition. The first draws on the judgment of Wilson J. in the Bhinder case. In separate reasons, concurring with the result and reasoning of McIntyre J., Madame Justice Wilson compared the dissenting view of the Chief Justice (at page 579-580):

> I have had the benefit of the reasons of both McIntyre J. and the Chief Justice and the difference between them, it seems to me, hinges on the meaning to be given to the phrase bona fide in s. 14(a) of the Act. If bona fide is used in the section simply to mean a genuine occupational requirement, i.e., that the wearing of a hard hat is as an objective factual matter a requirement for the appellant's job, then it seems to me that the Tribunal implicitly found that it was. The Tribunal, however, and the Chief Justice agrees, found that that was not what the legislature intended by bona fide. It intended that the bona fides of an occupational requirement be assessed in relation to each employee. The same occupational requirement might be bona fide vis-a-vis X but not vis-a-vis Y. By taking this approach the same result can, of course, be reached as if the section were not in the Act at all since, absent the section, the employer is obliged to accommodate the individual employee up to the point of undue hardship even if the requirement is a bona fide occupational one: see Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536 (judgment delivered concurrent herewith). If the employer fails to do so, it is discriminating under the Act. The Tribunal finds that, if it fails to do so, its occupational requirement is not bona fide vis-a-vis that employee within the meaning of s. 14(a).
>
> With respect, I do not think it is open to us under the statute to give the words bona fide a meaning which would have the effect of nullifying a provision which says that an employer will not be guilty of a discriminatory practice if the requirement he attaches to the job is a genuine requirement of that job. The purpose of s. 14(a) seems to me to be to make the requirement of the job prevail over the requirement of the employee. It negates any duty of accommodate by stating that it is not a discriminatory practice. I agree with McIntyre J. that discrimination is per se victim related but the occupational requirement is not a discriminatory practice as opposed to making it a defence to a charge of discrimination which would enable the employer to establish that he had discharged his duty to accommodate the particular complainant up to the point of undue hardship.

Counsel urged the same approach be taken to section 10 of the Ontario Human Rights Code 1981, on the basis that if section 10(a) were taken out, the Code, after the O'Malley decision, would still impose a duty of accommodation to the point of undue hardship. Consequently, on this view, section 10(a) cannot be found to import a duty of accommodation without becoming completely redundant.

In assessing the respondents' argument it must be emphasized that O'Malley was decided under the pre-1981 Ontario Code and Bhinder was decided under the Canadian Human Rights Code. Neither of those pieces of legislation deals

specifically with constructive or adverse effects discrimination. In both cases, recognition of adverse effects discrimination was the product of judicial inference. The present case, however, falls to be decided under section 10 of the Ontario Human Rights Code, 1981 and the unique feature of section 10 is that it is explicitly directed to constructive or adverse effects discrimination. Thus, the scope of section 10(a) is to be determined primarily by reference to the explicit provisions of section 10 and less by inference from previous decisions under different statutory regimes.

The first feature of section 10 to be noted is that a right of a person is stated to be infringed by constructive discrimination "except where (a) the requirement, qualification or consideration is a reasonable and bona fide one in the circumstances". In my view, this clearly marks section 10(a) as exceptional and not part of the definition of constructive discrimination. According to the principle established in Etobicoke, and accepted by the Supreme Court of Canada in Bhinder, it is therefore to be interpreted narrowly. I accepted the submission of counsel for the Ontario Human Rights Commission that , on a proper interpretation, section 10(a) does impose a duty of reasonable accommodation short of undue hardship.

In so concluding, I rejected the view that section 10(a) is thereby made redundant because a duty to accommodate would nevertheless have arisen in its absence by virtue of the decision in O'Malley. The O'Malley case concerned the predecessor to the 1981 Code under which constructive discrimination was not expressly contemplated. Its effect logically precludes a duty to accommodate in Bhinder given the specific terms of section 14(a) of the Canadian Human Rights Act and the fact that protection against constructive discrimination is there also a product of judicial inference rather than explicit statutory recognition. However, the O'Malley decision cannot be logically extended to preclude a duty to accommodate under successor legislation whose language is substantially different and which deals with constructive discrimination directly.

Indeed, the legacy of O'Malley is more appropriately recognized through finding that a duty of reasonable accommodation is imposed by the 1981 Code. Otherwise, one would have to conclude that the 1981 Code effectively repealed the duty to accommodate which O'Malley had established as existing under its predecessor. In my view that proposition was unsupportable.

In the first place, the language of section 10(a) is quite specific. Not only must the requirement, qualification or consideration be a bona fide one, it must be a "reasonable and bona fide one in the circumstances" (emphasis mine). These words solve the dilemma, evident in the contrast between the majority and dissenting judgments in Bhinder, over whether an occupational requirement is to be considered only at a general level or in light of the particular circumstances of the complainant. A neutral "requirement, qualification or consideration" which gives rise to constructive discrimination is only allowed to operate as an exception where it is reasonable and bona fide in the circumstances. And it is only reasonable in the circumstances, consistent with O'Malley, if accommodation cannot be accomplished without undue hardship. As noted by counsel for the Commission, the view that the words "in the circumstances" import a duty to accommodate in the particular circumstances of the individual complainant, is supported by Keene, Human Rights in Ontario (Carswell, 1983) at page 118.

The final argument made by counsel for the respondent Company on this motion arose out of the amendment created under An Act to amend certain Ontario Statutes to conform to section 15 of the Canadian Charter of Rights and Freedoms, S.O. 1986, c. 64. Section 18(8) of the Act, [which had not yet been proclaimed in force], provides that section 10 of the Ontario Human Rights Code 1981 is repealed and the following substituted therefor:

> **10.**-(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

(a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or

(b) it is declared in this Act, other than is section 16, that to discriminate because of such ground is not an infringement of a right.

(2) The Commission, a board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

(3) The Commission, a board of inquiry or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship.

Briefly put, the respondents' argument was that the new provisions are necessary to redress the inequality under the present Code which now provides for accommodation only under sections 40(2) and 40(3). On this submission it was necessary in order to provide equal protection as required by section 15 of the Charter, to bring in a general duty of accommodation because no such duty now exists. If such a duty does exist, argued the respondents, then why did the legislature bother creating a new section 10?

I was also unable to accept this argument. In the first place, the Interpretation Act, R.S.O. 1980, c. 219 provides that:

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

This is a clear pronouncement which ran contrary to the respondents' argument. Secondly, I believed the respondents' reliance on section 40 is misplaced since it is directed to remedies and not to rights. Thirdly, it was my view that, even in the absence of section 17 of the Interpretation Act, the new amendment did not support the inference which the respondents sought to draw. The 1986 amendment merely confirms the duty to accommodate and further specifies the considerations to be applied in assessing undue hardship.

For these reasons, I concluded that section 10 of the Ontario Human Rights Code, 1981 did impose a duty of proving accommodation short of undue hardship where a prima facie case of constructive discrimination on the basis of creed has been made out.

2. That The National Automobile and Agriculture Implement Workers of Canada, CAW Canada, Local 707, Cannot Properly Be Joined As A Respondent Allegedly in Violation of Sections 4(1), 8 and 10 of the Ontario Human Rights Code, 1981.

Counsel for the respondent Union submitted that, on the language of the Ontario Human Rights Code, 1981, a trade union cannot properly be found to have violated the provisions of sections 4(1) and 8, set out below:

> 4.-(1) Every person has the right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, record of offences, marital status, family status or handicap.
>
> 8. No person shall infringe or do, directly or indirectly anything that infringes a right under this part.

Counsel submitted that provision of the right to equal treatment with respect to employment is "peculiarly an employer's function" (Volume 1, page 78) and that the trade union should be viewed as a third party.

As I read the language of these provisions, counsel's argument cannot be accepted. Section 4(1) simply establishes the right of every person to equal treatment with respect to employment; section 8 is the provision which actually prohibits the infringement of that right. Therefore it is the language of section 8 which is crucial to the argument put forward on behalf of the respondent Union.

There are two features of section 8 which indicate that a trade union may properly be joined as a respondent. The first is that "person" is defined, as counsel noted, to include a trade union under section 45(c) of the Code. The second is that an infringement may arise "directly or indirectly". Thus, while issues involving the right to equal treatment

with respect to employment might usually be expected to arise "directly" between the employee and employer, section 8 clearly contemplates them arising at least "indirectly" between employees and other persons, including trade unions.

Strictly by interpretation of the language of the Code, which is the only support adduced by counsel for the Union, a trade union is capable of infringing a right under section 4(1) and, by logical extension, is also at least susceptible to the application of section 10. Counsel also stressed that the rights claimed by the complainants must be considered in the context of a collective agreement which governs the rights of thousands of other employees. These considerations are no doubt of great importance to this case but in my view they went to merits and not to the matter of whether the Union may be joined.

3. That the Complainants do not Adequately Allege a Violation of the Ontario Human Rights Code, 1981 by The National Automobile and Agricultural Implement Workers of Canada, CAW Canada, Local 707.

Counsel for the respondent Union took the position that, even if it is proper for the trade union to be joined as a respondent, the actual complaints do not disclose an alleged violation of the Ontario Human Rights Code, 1981 by the Union. Counsel for the Commission submits that there is adequate disclosure on the face of the complaints and referred specifically to paragraph 4. Paragraph 4 of Mr. Roosma's complaint, dated August 29, 1985, is substantially identical to paragraph 4 of Mr. Weller's complaint dated September 5, 1985 and reads as follows:

> Because my work schedule precludes me from observing the Sabbath on two Fridays of every month, in or around October 1984 Robert Weller, a co-worker and a member of the Worldwide Church of God, and I went to see Mr. Van Gaal, Vice-President of the United Auto Workers local #707. We asked Mr. Van Gaal if he could be of assistance in helping us to keep God's commandments concerning the Sabbath observance. We offered to work extra hours through the week or to come in on Sundays. Mr. Van Gaal advised that the Union was unable to assist us because of the collective agreement.

Both complainants also list The United Auto Workers, Local 707 (as it then was) as a respondent. Both complaints also allege their "right to equal treatment in employment with discrimination has been infringed by the above cited respondents because of ... creed, in contravention of sections 4(1) and 8 of the Human Rights Code, 1981" (Roosma complaint,

paragraph 10; Weller Complaint, paragraph 9) and that their right to equal treatment in employment without discrimination has been infringed in contravention of section 10 (Roosma Complaint, paragraph 11; Weller Complaint, paragraph 10). These allegations are unaffected by the amendments to the Complaints on October 31, 1986.

It was my ruling that the complaints did adequately allege a violation of the Ontario Human Rights Code, 1981. Counsel for the respondents referred in argument to section 8 of the Statutory Powers Procedure Act R.S.O. 1980, c. 484 which provides:

> Where the good character, propriety of conduct or competence of a party is an issue in any proceedings, the party is entitled to be furnished prior to the hearing with reasonable information or any allegations with respect thereto.

Section 8 does not specify what information must be included in the complaint either generally, or with respect to the specific allegation of a contravention. Its effect is to require that, prior to the hearing, a respondent receive sufficient information about the allegations to enable preparation of an answer to those allegations; Nembhard v. Caneurop Manufacturing Limited, Ontario Human Rights Commission Board of Inquiry, 1976, unreported at page 22; referred to by Keene, Human Rights in Ontario, at page 246. Counsel on all sides argued at some length over sufficiency of particulars, the late date at which documents and other submissions had been received and the like. Requests for particulars were subsequently made. However, this motion alleged that no contravention of the code by the Union was adequately revealed by the complaints. I was not prepared to hold that the complaints are materially defective in this regard because, on the terms of the complaints identified above, I believed that the alleged contraventions were set out on the face of the complaints.

Appeals from my preliminary decision were launched by the respondents and came before a three judge panel of the Divisional Court. At the outset of the hearing of the Divisional Court, the Human Rights Commission successfully brought a motion to quash the appeals on the grounds that subsection 41(1) of the Code does not confer the right to

appeal preliminary and interlocutory rulings of a board of inquiry; see Roosma v. Ford Motor Co. (1988), 66 O.R. (2d) 18. With the quashing of the appeals by the Divisional Court the stay of proceedings of the board of inquiry in this case was no longer in effect. Consequently, the hearing resumed at which time argument was heard on three additional preliminary motions.

The first motion was put by Mr. Juriansz, Counsel for the respondent Company, asking that each complainant be excluded from the hearing room during the cross-examination of the other complainant relating to the nature of that complainant's religious belief and all related matters. After hearing argument, I denied the motion; under subsection 38(2) of the Code , both complainants are parties to the proceeding and in the absence of any authority indicating why their exclusion would be justified, are entitled to be present. The following is the substance of my decisions on the two succeeding preliminary motions (reported at 10 C.H.R.R. D/5766):

III. REASONS FOR DECISION ON ADDITIONAL PRELIMINARY MOTIONS

1. Particulars

Section 8 of the Statutory Powers Procedure Act, R.S.O. 1980, c. 484, applies to boards of inquiry exercising a statutory power of decision under the Ontario Human Rights Code. This section provides:

> Where the good character, propriety of conduct or competence of a party is an issue in any proceedings, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

On their face, the complaints reveal that "the propriety of conduct" of the respondent Company and Union through their officials, is in issue in these proceedings. Accordingly, as counsel for the respondent Union maintained, the respondent

is entitled to be furnished with "reasonable information of any allegations" with respect to the conduct of Union officials. The issue, on this motion was whether adequate particulars had been provided by the Ontario Human Rights Commission. Mr. MacLean argued that, by the application of s. 8 of the Statutory Powers Procedure Act, the Union is entitled to know "what it is being accused of imposing, in terms of a requirement, qualification or consideration, and when it imposed that, and how it did it, and who did it, the basic fundamentals of natural justice" (Transcript, vol. 111, p. 26). In support, he cited the decision of the Board of Inquiry in Dubajic v. Walbar Machine Products of Canada Ltd. (1980), 1 C.H.R.R. D/228. In that case, Walbar argued that s. 8 of the S.P.P.A. required the Commission not only to provide it with a statement of material facts but also to disclose the evidence on which it intended to rely in proof of its factual allegations; the Commission was agreeable to furnishing a statement of facts, but counsel took the position that "such matters as, where and when an incident took place, giving rise to an allegation within the meaning of s. 8 of the Act, represented a statement of evidence and not fact."

Professor Gorsky, Board Chairman, said the following (para. 2006):

> My view of s. 8 of the Act is that it was introduced to regulate one aspect of procedural natural justice which must be followed by certain tribunals including a Board of Inquiry appointed pursuant to s. 14(a)(1) of the Code. Whatever the scope of the information which must be furnished, its purpose is to define the issues and thereby prevent surprise by enabling the party against whom the allegations are made to prepare for the hearing. At the very least, s. 8 of the Act in order to fulfil this purpose would require that Walbar be furnished with a written statement of the material facts upon which the Commission intends to rely in support of the allegations with respect to the issues involving Walbar's good character or the propriety of its conduct. Such material facts should include when and where the alleged acts, which raised the issues, occurred,as well as the names of such persons who are referred to in the allegations, subject to the exceptions above noted.

The Chairman continued, at para. 2009, "... I would also find that s. 8 does not contemplate a means of obtaining discovery of documents for inspection or statements of evidence by which it is intended to make out a case."

In support, Mr. MacLean also cited the Board of Inquiry decision in Joseph v. North York General Hospital and College of Nurses of Ontario (1982), 3 C.H.R.R. D/854. In that decision the Board Chair, Professor Hunter, quoted Fairbairn v. Sage (1925), 56 O.L.R. 462 at 470, where Ferguson J.A. listed the purposes for which particulars are ordered:

(1) to define the issue;

(2) to prevent surprise;

(3) to enable the parties to prepare for trial;

(4) to facilitate the hearing.

Professor Hunter went on to conclude, having reviewed the particulars already provided, that they reasonably defined the issues and enabled the North York General Hospital to prepare adequately for the hearing.

Mr. Lepofsky, counsel for the Commission, provided a statement of particulars to Mr. MacLean, counsel for the respondent Union, prior to the commencement of hearings (Exhibit 3). Mr. MacLean quarrels with the sufficiency of paragraph 9, which reads as follows:

> 9. In their efforts to obtain some form of accommodation of their religious beliefs, the complainants sought the support of the respondent Union, of which they are members. The respondent Union was not prepared to file a grievance on behalf of the complainants arising out of the refusals of the respondent Ford to accommodate their creed. The respondent Union was not prepared to support the complainants' request to be accommodated with respect to their religion,and indeed has expressed opposition to certain accommodations which the complainants have proposed. As well, in discussions with the respondent Ford regarding proposals put forward by the complainants, by which their creed could be accommodated, the respondent Ford has indicated that certain proposals would not be feasible because the respondent Union would not go along with them. Accordingly, the refusal of the respondent Ford to accommodate the creed of the complainants is due at least in part to acts or omissions on the part of the respondent Union.

Mr. MacLean takes the position that "the statement does not indicate ... who was involved, when, where, or the particulars of the discussions, or transactions. The respondent Union is left entirely in the dark as to what that is about" (Transcript, vol. 111, p. 32).

Mr. Lepofsky replied by letter of September 9, 1988, to Mr. MacLean's request for further particulars. Mr. Lepofsky's position was that ample particulars had been provided for a substantial period of time, that no further particulars were required and that the request for further particulars was late. Nevertheless, Mr. Lepofsky appended a "Summary of Key Points in the Complainants' Evidence Regarding the Union" (Exhibit 7). Paragraph 1 of this summary reads as follows:

> 1. Over the period of October/November 1984 up until the complainants were terminated, they approached the following Union officials to request that the Union assist and cooperate in arranging an accommodation of their need to be relieved of work responsibilities on Friday nights: William Van Gaal, David Hall, Don Ferguson, Jim Donegan, David Hurley, Ted DeLuca, and a Mr. Headley.

Mr. MacLean's position was that "we have no idea whatsoever as to what is being referred to in paragraph 1, with respect to the time and place, when these individuals were approached, or what was said to them, or what accommodation was sought, if any, and what they said." He had similar objections to other paragraphs contained in the summary provided by Mr. Lepofsky. He therefore asked for the ordering of further particulars or, in the default of their production, that the complainants be dismissed as against the respondent Union. In conjunction with this request, Mr. MacLean asked for an order requiring the Commission to provide information as to what they contend the trade union could have done, or failed to do, which would have effectively accommodated the complainants.

I dealt first with the latter request. These complainants allege constructive discrimination under s. 10 of the Ontario Human Rights Code, 1981. In my first interim decision, I concluded that s. 10 does impose a duty of proving accommodation short of undue hardship where a prima facie case of constructive discrimination on the basis of creed has

been made out. It follows logically from this conclusion that the Commission is required to render particulars of its prima facie case but not on the affirmative defence of reasonable accommodation where the burden shifts to the respondent. In so determining, I did not at that time pronounce on the scope or even the existence of any legal duty of reasonable accommodation on the respondent Union, as that is not the proper subject of a preliminary ruling. I am therefore left with the question whether the Commission has provided adequate particulars of its prima facie case.

Mr. Lepofsky's position, on behalf of the Commission, was diametrically opposed to Mr. MacLean's. The Commission's view was that the respondent Union had been rendered "ample, indeed, substantial particulars, well in excess of any obligation on the Commission, and well in excess of any required under either s. 8 of the SPPA, or under the principles of natural justice." Mr. Lepofsky supported this contention initially by reference to the two-year period of investigation. There, the Commission investigating officer went through a process of fact-finding and conciliation during which these matters must have been discussed with representatives of all parties. The respondent Union would also have received a copy of her summary of investigation.

The issue of particulars had been raised during the initial hearings in August 1987. According to Mr. Lepofsky, and counsel for the respondents did not disagree, counsel for the respondents were invited to Mr. Lepofsky's office to read his file. They were thus given full access to the documents in his file, subject only to those that were privileged or irrelevant, and these included the notes and summaries of the investigating offer from fact-finding and conciliation efforts which dealt with events in October and November 1984, and beyond. Counsel were even invited to take photocopies if they wished. It is to be noted that this sort of documentary disclosure goes beyond what the case authorities, including Walbar Machine Products, supra, provide for.

Mr. Lepofsky stated that the particulars sought by Mr. MacLean were covered in these documents. Given the extensive disclosure made to the respondent Union as described above, it was barely conceivable that the respondent Union

was not extensively aware of the prima facie case that the Commission will seek to establish. The request for further particulars was therefore denied.

I noted, however, that Mr. MacLean and Mr. Lepofsky disagreed as to whether certain information was contained in the Commission's file when it was examined by a representative of the respondent Union. To ensure that the respondent Union had indeed received the benefit which the Commission asserted has been provided to it, and which I held made further production of particulars by the Commission unnecessary, I therefore ordered the Commission to give the respondents access to its file on the same basis as it did, extraordinarily, before. Specifically, on November 1 and 2, 1988, Mr. MacLean, or his representative and, if he wished, Mr. Juriansz or his representative were to be entitled to attend at Mr. Lepofsky's office to examine the file except only for documents which the Commission fairly deems privileged or irrelevant to the case. The respondents' representatives were also entitled, as they were in the first instance, to take photocopies of documents in the file. This left a full six weeks for the parties to continue preparing their cases before we reconvened on December 14, 1988.

2. The Scope of the Commission's Case

As I indicated above, and in my first interim decision of November 20, 1987, the burden is initially on the Commission to establish a prima facie case of constructive discrimination and then shifts, if the prima facie case is established, to the respondents, subject of course to any arguments that might be made regarding the existence of any legal duty to accommodate by the respondent Union. It follows, therefore, that the burden is not on the Commission to show that the respondents could reasonably have accommodated the complainants. In the normal course of events, the Commission would attempt to establish its prima facie case, the respondents would put in their defence and the Commission would call reply evidence to respond to that defence. In this case, however, Mr. Lepofsky found himself in a dilemma.

The dilemma is easily stated. In attempting to establish its prima facie case, the Commission would call the complainants. If the Commission attempted to anticipate the respondents' possible defence of reasonable accommodation by examining the complainants in-chief on that issue, Mr. Lepofsky was concerned that he would be vulnerable to a charge of case-splitting and a possible order preventing him from recalling the complainants in reply. If, on the other hand, he did not examine them in-chief on the issue of accommodation, but the respondents exercised their right to cross-examine during the case-in-chief on that issue, he was afraid he would be similarly vulnerable to being precluded from calling reply evidence in response. He therefore sought a ruling in advance.

Counsel for the respondents took the position that it would be inappropriate for a board to make such an advance ruling. Mr. MacLean, in a letter to me of October 6, 1988, was particularly concerned that there be no compromise of his client's right to argue, at the close of the Commission's case-in-chief, that the Commission had failed to establish any prima facie case as against the Union.

During argument, Mr. Lepofsky advised that he was relying on a preliminary ruling by a Board of Inquiry of July 7, 1988, in the case of Gohm v. Domtar and Office and Professional Employees International Union. In that case, in which Mr. Lepofsky also acted for the Commission, the complaint was also one of employment discrimination based on creed there arising out of the alleged dismissal of the complainant due to her unwillingness, as a Seventh Day Adventist, to work on a rotating Saturday shift. Mr. Lepofsky undertook to provide a copy of that ruling, which he did in enclosing a copy of pp. 45-61 of the transcript of the July 7 hearing with a covering letter of September 30, 1988.

It is unusual for such an advance ruling to be sought and perhaps equally unusual to cite, in support, a preliminary ruling from a similar case which is not reported because it is not concluded. However, as Professor Pentney notes at p. 58 of the Gohm transcript, we are largely in "uncharter terrain." I deemed it desirable to give guidance to the parties so long as neither or them was thereby unfairly advantaged or disadvantaged in this adversary proceeding. In Gohm, the

Commission sought an order permitting it to tender no evidence in-chief from the complainant respecting reasonable accommodation. Professor Pentney ruled as follows:

> It seems to me that it is important to recall that in this proceeding I am not bound by the formal rules of evidence. Nor, save to a limited extent, am I bound by many of the rules that govern civil proceedings. But it seems to me that ... when Mrs. Gohm is on the stand, it would behoove all parties to engage in as full and complete an examination of her as possible, to get that aspect of the case of out the way. I don't see that that creates an unfair advantage in the respondents or should leave either of ... the complainant or the Commission to have to try to anticipate fully the case that the respondents, particularly the respondent Domtar, is about to lead. I am prepared to allow the Commission ... to call evidence in rebuttal to meet specific points concerning possible other accommodations that were contemplated or were possible and that would include recalling Mrs. Gohm to meet those specific points if that comes up in their case ...
>
> I'm prepared to rule that the Commission in rebuttal ... should be permitted to tender evidence to meet the specific evidence, particularly of other accommodations available to the Company or the Union, if Ms. Lennon's point is not accepted that there is no duty on the Union, or to meet the specific issues of undue hardship that are led by the Company. But I'm not prepared to rule at this stage that the ... respondent shouldn't cross-examine on those other issues of undue hardship. It seems to me that we are better off to get as much evidence in through Mrs. Gohm at this stage as we can.

I concluded that a similar ruling was appropriate in this case. Consequently, the Commission should adduce from the complainants all their testimony on the issue of constructive discrimination and the duty to accommodate, in general, during its case-in-chief. Because the burden is on the respondents to prove accommodation short of undue hardship where a prima facie case has been made out, the Commission was to be entitled to recall the complainants or adduce other evidence in reply except to the extent that the reply evidence would simply reiterate earlier testimony.

IV INTRODUCTION

Michael Roosma and Robert Weller, the complainants in this case, worked as gas-tank installers on the assembly line of the Oakville plant of the Ford Motor Company of Canada. They became interested in the Worldwide Church of God which requires its members to refrain from work during a Sabbath that is held to run from sunset Friday to sunset Saturday. Their interest grew to the point that they sought and were subsequently granted membership and a dilemma

was then presented that is central to this case. According to the terms of their employment, as determined under the collective agreement between the National Automobile and Agricultural Implement Workers of Canada, CAW, Local 707 and Ford, they were required to work two Friday night shifts in each four week period.

The complainants objected and discussed with Ford and the Union the prospect of accommodation of their request to be relieved of work obligations on their Sabbath. They allege that they offered various solutions to the problem but that Ford refused to alter the shift rotation and the Union refused to support a grievance on the ground that to do so would be inconsistent with the terms of the collective agreement. In late 1984, the complainants stopped working during their Sabbath. Except where they were able to obtain special leave to be absent or on the few occasions that they managed to swap jobs, their absences at these times were treated as unauthorized. In late August and early September 1985 respectively, the complainants filed complaints with the Ontario Human Rights Commission alleging discrimination by Ford and the Union. Their absences from work to observe their Sabbath continued to be treated as unauthorized and they became subject to progressive discipline right up to the termination of Mr. Roosma on November 4, 1987 and Mr. Weller on August 8, 1988.

In light of the preliminary rulings described above, it is useful to consider the general principles of human rights law that form the backdrop for this Inquiry. I will then review the pertinent evidence adduced at this lengthy hearing and, in light of that evidence, address the following issues:

1. Has a prima facie case of constructive employment discrimination been established against Ford?

2. Has a prima facie case of constructive employment discrimination been established against the Union?

3. If a prima facie case is established against Ford, has Ford discharged the onus of showing that it took the necessary steps, short of undue hardship, to accommodate the religious observance required under the complainants' creed?

4. If a prima facie case is established against the Union, has the Union discharged the onus of showing that it took the necessary steps, short of undue hardship, to accommodate the religious observance required under the complainants' creed?

V. GENERAL PRINCIPLES OF HUMAN RIGHTS LAW

The primacy of the Ontario Code can be seen in the stipulation, in subsection 46(2), that "where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply notwithstanding this Act". As Judith Keene observes (Human Rights in Ontario, 2nd ed., p. 4) there is also "authority for the propostion that human rights legislation takes precedence over other legislation even without a specific statutory provision and ... the Supreme Court of Canada has demonstrated itself willing to interpret human rights legislation liberally and purposively". In O'Malley v. Simpson Sears Ltd. [1985] 2 S.C.R. 536, discussed above, Mr. Justic McIntyre stated that the guide to the nature and purpose of human rights legislation is provided in the preamble to the Ontario Code (at pages 546-547):

> There we find enunciated the broad policy of the Code and it is this policy which should have effect. It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The accepted rules of construction are acceptable enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment (see Lamer J. in Insurance Corporation of British Columbia v. Heerspink, [1982] 2 S.C.R. 145, at pp. 157-158), and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary -- and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group

> of persons obligations, penalties or restrictive conditions not imposed on other members of the community, it is discriminatory.

As Professor Pentney has observed in Gohm v. Domtar Inc. (1990), 12 C.H.R.R. D/161, an important decision to which I will return, the statement of general principle by Justic McIntyre in O'Malley "has been repeated by the Supreme Court of Canada in virtually every human rights decision since 1985, so that today it must be a touchstone to guide all interpretation of these laws."

In Action Travail des Femmes v. Canadian National Railway Co. [1987] 1 S.C.R. 1114, then Chief Justice Dickson, at page 1134, described the "proper interpretative attitude towards human rights codes and acts":

> Human Rights legislation is intended to give rise among other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation, the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact.

It follows that exceptions to the guarantees provided by the Ontario Human Rights Code are to be construed narrowly.

VI. THE EVIDENCE

Mr. Michael Roosma began working at Ford in July 1983 and during his period of employment he was a member of Local 707 of the United Automobile Workers which became the Canadian Automobile Workers Union. During October and November 1984 he held the job of gas-tank installer on the assembly line. During the fall of 1984, Mr. Roosma came to believe in the teachings of the Worldwide Church of God. He described the Worldwide Church of God as a Christian Church whose basic beliefs are rooted in the old and new testaments of the Holy Bible and in the Ten Commandments. He believes the Bible to be the word of God and that he is to keep God's word.

According to the beliefs of the Worldwide Church of God, the Sabbath occurs from sunset Friday to sunset Saturday and believers are required to rest, according to the fourth commandment, and are prohibited from working. Mr.

Roosma testified that since he first became a believer in the Church he has observed the Sabbath by attending church and refraining from work.

The Church calendar of the Worldwide Church of God lists annual holidays that are to be observed. These do not include Christmas or Easter. In April, the Passover holiday is celebrated although believers are allowed to work on that day. The Passover holiday is followed by the Feast of Unleavened Bread which covers seven days. The first and last days of that seven period are considered high holy days and believers are not allowed to work on those days. In September, the Feast of Trumpets is celebrated and believers are not allowed to work on that day either. The Feast does not occur on the same day every year because the church calendar is based on the lunar year. After the Feast of Trumpets, the next holiday is the Day of Atonement and believers are not permitted to work on that day. Finally, there is the Feast of Tabernacles which runs for eight days and believers are forbidden from working on the first and last of those days because they are again considered to be high holy days.

Mr. Roosma testified that he met his fellow complainant, Robert Weller, in 1983 and subsequently discovered that he too was interested in the Worldwide Church of God. They both began attending the St. Catharines' congregation of the Worldwide Church of God around November 1984.

At this time, Mr. Weller was also working at the Oakville Ford assembly plant. It is housed in one large building with the assembly line production divided into several departments. The body of the car is assembled in the body build department and is then painted and undercoated in the paint department. It then goes to the trim line where dashboards are installed, carpeting is put in, windshields are installed and other types of fine work such as pinstriping are applied. The car then goes to the chassis department where, for example, gas tanks and motor mounts are installed and then to the finalizing department where gasoline is put in and the car is given a final check to make sure that it is operating properly.

Each department is subdivided into zones, each headed by a supervisor who in turn reports to the general foreman. Over the general foreman is the superintendent and at the top of the hierarchy is the plant manager. In each zone, there is a lead hand or a utility man whose duties include filling in temporarily for those who are absent, working on repairs and making sure that those on the assembly line are stocked with the materials they need. Each zone also has absentee allowance personnel assigned to it. Mr. Roosma testified that he worked in zone C and there were two absentee allowance people assigned to his zone. There was also a relief man whose job it was to relieve workers in order of their job so that they could go to their breaks. This is to enable the assembly line to continue without having to shut down although there are times when the line does shut down completely for relief and this is described as "mass relief". Finally, there were also workers who were called floaters who were not assigned to particular zones but who could fill in as required in various positions when somebody was absent.

The assembly line at the Oakville Ford plant operates in two shifts from Monday through Friday; it does not run on Saturday or Sunday. From Monday through Thursday the day shift begins at 7:00 a.m. and ends at 5:30 p.m. and the night shift begins at 6:30 p.m. and runs until 5:00 a.m. On Friday, the day shift begins at 7:00 a.m. and ends at 3:30 p.m. and the night shift begins at 4:30 p.m. and ends on Saturday morning at 1:00 a.m. On Saturdays and Sundays, when the assembly line is not running, the plant activities include maintenance, carried out by the labour gang working in three shifts, and repair work at the hoists.

Mr. Roosma testified that in the fall of 1984 he was working directly with Mr. Weller because the installation of gas tanks was a two-man job. The gas tank moves from a sub-assembly line that runs perpendicular to the main line; Mr. Roosma was positioned directly under the gas tank and had to first tighten two clamps on the fuel lines and the vapour line. While he was performing these functions, Mr. Weller secured the park brake cables and put in the gas tank straps. Mr. Roosma then would pick up the gas tank and walk to Mr. Weller's station. While Mr. Weller held the gas tank, Mr. Roosma would insert a plug and then use his airgun to secure the straps to the car frame by tightening two

bolts. Mr. Weller would then go back to preparing for the next car to arrive while Mr. Roosma put an air-conditioning shield on the front of the car frame. He then returned to the sub-assembly line to prepare the next gas tank. The time allotted to install the gas tanks is one minute but Mr. Roosma testified that he and Mr. Weller actually took only 40 seconds and could do approximately 65 cars in an hour. When asked how long it took him to learn his job and to get up to production speed, Mr. Roosma replied that it took him five minutes.

Robert Weller started working for the Ford Motor Company in September 1977 and was a member of the Union until his employment was terminated in August 1988. At the time of testifying he was a member of the Brampton congregation of the Worldwide Church of God and he described the church's beliefs in the same terms as Mr. Roosma. As Mr. Roosma had done, he indicated that if he broke the Sabbath, he would be violating God's word and it would be his minister's duty to approach him on the matter. If he persisted in breaking the Sabbath then he would be disfellowshipped from the church.

Mr. Weller also testified that he is not under any religious obligation, as a member of the Worldwide Church of God, to try to convince others to join the church. The Worldwide Church of God teaches that non-believers will have the opportunity, after death, to repent and accept God's word and thereby attain eternal life. Mr. Weller was baptized in the Worldwide Church of God on June 18, 1987. Until the point of baptism, he was considered a prospective member of the church and became a full member at his baptism.

Mr. Weller was asked how long it took him to learn the gas-tank installer job and to get up to production speed and responded that it took about three or four hours. He conceeded that at the time he was not trying to learn the job as quickly as he could but that his attitude towards his work changed after he converted to the Worldwide Church of God.

In October 1984, the complainants decided to see if they could work around the Friday night shift requirement so as to avoid working on their Sabbath. The spoke to their supervisor, John Sokic, who told them he would check things out and get back to them. He returned to their place on the assembly line shortly thereafter and said he was sorry but he could not assist them.

The complainants then spoke with Frank Wiley, the production manager. They visited him in his office and Max MacLean, the head of the Labour Relations Department, was also present. According to Mr. Roosma, this meeting took place in late October. Mr. Wiley raised the problem of the collective agreement and the complainants raised the possibility of perhaps working on the labour gang, or working extra hours or on Sundays. According to their testimony, they were always ready to consider any option that was reasonable that would not conflict with their Sabbath. Mr. Wiley explained that he could not accept their suggestions because they did not have enough seniority to work in those alternative capacities.

The complainants next determined that they should speak with the president of local 707, Brian Feil. Sometime during the late fall, they visited the Union hall which is located on the service road beside the plant. They had no appointment to see Mr. Feil and discovered he was not in but they did speak to Mr. Bill Van Gaal, then the vice-president of local 707. According to their testimony, Mr. Van Gaal's response initially was to say that if they were given Friday nights off, everybody would want them off. He also responded to their suggested alternatives by referring to the collective agreement and indicating that their proposals were not workable because they did not have sufficient seniority.

Later in November, Mr. Roosma saw Mr. Ted Stawikowski while working on the assembly line. Mr. Stawikowski is a member of management in the Labour Relations Department. Mr. Roosma told Mr. Stawikowski that he would be willing to pay the costs of replacing him with another worker. So, for example, if someone was willing to work Mr. Roosma's Friday night shift on an overtime basis, and was entitled to be paid at a time and a half rate, Mr. Roosma would

have been prepared to pay the extra half. According to Mr. Roosma, Mr. Stawikowski said that he was sorry but that he could not assist him.

Both complainants testified that they continued to be assigned to alternating two week shifts of days and nights. They both testified that they did not work during their Sabbath and regularly advised Company representatives that they would not be doing so. Each was aware of the Ford policy regarding absenteeism which was loosely described as a "two and twenty policy". According to this policy, employees who took two unauthorized days off in a twenty working day cycle would be subject to an interview. So, for example, if the complainants missed work on a Friday night, they would be asked by their foreman on Monday morning where they had been and the foreman was obliged to tell them whether their absence was authorized or unauthorized. If unauthorized, a notation to that effect would go down on the employee's work record. If two such occurrences took place in twenty working days, an interview would take place almost immediately between the employee, the supervisor and the Union representative. If, at the end of the interview, it was determined that the Friday night absence was unauthorized, then progressive discipline would be instituted. A first step is a verbal warning, followed at the next step by a written warning, then a one-day suspension, then a three-day suspension, then a seven-day suspension, then a fourteen-day suspension, then a twenty-eight day suspension and then termination. A grievance might be lodged at any of these disciplinary steps. Each of these steps was followed in the disciplinary process leading up to Mr. Roosma's termination of employment.

Mr. Roosma testified that in each instance where he did not come in for work on the Friday night in order to keep his Sabbath, he advised the Company in advance that he would be absent. After receiving his one-day suspension, Mr. Roosma spoke to his committee man, Don Ferguson. He referred to article 7.01 of the collective agreement which provides that "the Company and the Union acknowledge that the provisions of this agreement shall apply to all employees without discrimination, and in carrying out their respective obligations under this agreement, neither will discriminate against an employee on the account of race, creed, colour, nationality, age, sex, ancestry, or place of origin, or against any

handicapped employee... ." Mr. Ferguson told Mr. Roosma that he would be better advised to see somebody higher up in the Union and so Mr. Roosma spoke with Jim Donegan. Mr. Donegan advised Mr. Roosma that his grievance would not win at arbitration and referred to the Friday night shift work requirement in the collective agreement, advising Mr. Roosma that if he received Friday nights off, it would set a precedent. From that point, Mr. Roosma did not ask the Union to grieve further suspensions because he felt he knew what their position was. He did approach the Union about grieving his termination and spoke with Mr. Van Gaal. Mr. Van Gaal asked him if he would be willing to work some Friday nights but Mr. Roosma said he could not compromise. Mr. Van Gaal said that he would not pursue a written grievance but that he would take the matter verbally to the inplant committee. However, Mr. Roosma testified that nothing was ever reported back to him.

Due to a number of factors, three years had lapsed before all the steps of progressive discipline had been reached and Mr. Roosma terminated. There were brief periods of illness and a period of 102 working day when Mr. Roosma was off on workers' compensation for a back problem and there were also flaws in the Company's attempts to impose progressive discipline at various stages. For example, if a foreman failed to advise Mr. Roosma that his Friday night absence was unauthorized when questioning him about it on a Monday morning, this could well taint a subsequent interview so that the Company was required to start the "two and twenty" progress over again before taking a new disciplinary step.

Mr. Roosma was also occasionally able to make arrangements to change shifts with employees on the opposite shift. He did this for the first time in February 1985. He and Mr. Weller approached their Union representative, Davey Hall, on the assembly line to ask if he would find out whether any workers on the opposite shift would switch with them. Some indicated a willingness to shift if it was made worth their while financially. Effectively, the complainants were asked to put up an amount equal to half time for the shift which amounted to about $55.00. The effect of this arrangement was that the complainants, who were working on the night shift in those weeks, would work their regular Thursday night

shift and then after only a two-hour break between the shifts, switch with the opposite members and work their Friday day shift. This meant that they were working for 18 hours in a 20 hours period. Each found that they were so exhausted that they did not pursue this arrangement again nor was it ever offered to them.

Mr. Roosma also described how, in the fall of 1985, he changed shifts with another worker, Mark Kozicki, for two weeks. Mr. Roosma was scheduled to work the night shift but changed with Mr. Kozicki in exchange for $100 worth of food store gift certificates. The certificates were used instead of cash because of Company concerns that money not change hands under such circumstances. After the first of these two weeks, Mr. Kozicki stated that he was not receiving sufficient benefit from the arrangement and asked Mr. Roosma if he would also work the Monday day shift of the second week so that Mr. Kozicki would get a three-day weekend. Mr. Roosma was able to enlist the help of Mr. Weller in covering Mr. Kozicki's Monday day shift but this arrangement did not go beyond the two weeks because Mr. Kozicki said that he would require a further increase in what he was being paid to make the swap. Mr. Roosma testified that Union officials knew of the arrangements with Mr.Kozicki including the exchange of gift certificates but told Mr. Roosma to keep it to himself.

Mr. Roosma made one other attempt to change shifts but was unsuccessful. He recalls approaching a man who worked on the grease press but cannot remember his name, recalling only that he had a Scottish accent. He was interested in working steady nights but did not want to do the gas-tank job. Mr. Roosma also learned from his Union representative that he would not simply be able to switch into the grease press job in any event because he was not classified for that job in that area.

Mr. Roosma testified that he and Mr. Weller regularly approached Davey Hall and Don Ferguson to seek their assistance in helping them switch shifts to avoid working on their Sabbath. To his knowledge, these Union representatives did not actively seek a solution to the problem.

The complainants also managed to avoid discipline by obtaining unpaid leaves of absence to interrupt the operation of the "two and twenty" rule. Leaves of absence are obtained by making a request to the shop steward or the foreman who then provides a request form to fill out. In the Fall of 1985, the complainants asked for a leave of absence so they could observe the Feast of Tabernacles. Mr. Roosma believes that the written request for this leave of absence was submitted approximately two months in advance. Mr. Roosma testified that he only found out that the request for the leave of absence had been denied in conversation with Mr. Stawikowski on another matter. He then approached Don Ferguson to ask why the leave had been denied and was told that there were too many workers out at that time. The complainants checked with the workers in their zone and discovered that none of them were taking the relevant period off and so they went back to the Union representative, Mr. Ferguson, who suggested they apply for the leave of absence again. They did so and Mr. Weller was told almost right away that he could have the time off but Mr. Roosma's leave was not confirmed until three days before the Feast. This confirmation was verbal and was followed up by a telephone call to Mr. Roosma from Ford on the Saturday morning as he was leaving to celebrate the Feast. The caller advised him that he could have the time off and that he would receive confirmation in writing. Mr. Roosma did not encounter similar difficulties in apply for subsequent leaves of absence.

There were several occasions when the complainants went into work for the Friday night shift, stayed until sunset and then left. Mr. Roosma testified that this happened for the first time in November 1984. The work force appeared to be at full complement and Mr. Roosma asked his supervisor, John Sokic, if he could come in and go home before sunset. He made this request several days beforehand and was told that Mr. Sokic would let him go if the Company had the manpower.

Mr. Roosma also referred to a conversation, that he believes may have taken place in the spring of 1986, with his Company superintendent, Frank Scopaz. Mr. Scopaz asked him if he was willing to come in on Fridays and work until sunset as Mr. Weller was doing. Mr. Roosma said that he would be happy to do so and Mr. Scopaz confirmed that it

would not be contrary to his beliefs for him to come in and work until sunset on Friday evenings. Mr. Roosma described Mr. Scopaz as being "very happy" at his response. Shortly thereafter, Mr. Roosma again saw Mr. Scopaz as he was getting some gloves out of a locker and Mr. Scopaz said to him "anything that I have asked you, and I have told you, forget it". Mr. Scopaz offered no further explanation when pressed by Mr. Roosma.

The complainants nevertheless decided to present themselves for work at the Friday night shift with the intention of continuing until sunset. When they arrived, they were met by Mr. Stawikowski, the Union representative Davey Hall, Mr. Scopaz and their general foreman, Glen Currie. They all went into the foreman's office where Davey Hall took the position that if Frank Scopaz had given his word, he should keep it. The response from Mr. Stawikowski was that they would be required to work the full eight-hour Friday night shift. However, the result was that the complainants went back to their jobs and worked until sunset and were not disciplined for leaving at that time.

On one other occasion, around September/October 1987, the plant was not in full production and the complainants asked their supervisor, Gerry Drozd, if they could leave early on a Friday night. He told them he would see and on the Friday in question he told them they could "sneak out". They did so and no disciplinary action was taken.

Mr. Roosma testified that in his part of the plant there did not appear to be any greater problem with coverage for absent workers on Friday nights than on any other night of the week. From his hiring in 1983 until his conversion to the Worldwide Church of God in 1984, he recalls few occasions when Friday night absenteeism required shutting down the entire line for 20 minutes in what is described as "mass relief".

Mr. Roosma was asked to give examples of types of accommodation that he believes could have been made. He identified several: being placed in a non-bargaining unit job, having him work six months of straight days during the winter and six months of straight nights during the summer so that student replacements could be used on the Friday night

shift during the summer, assigning the complainants to the labour gang, giving the complainants a straight leave of absence for the single Fridays that they were required to work nights, allowing the complainants to pay the extra half time to a regular day shift member who was willing to double back onto the night shift in their place, or to allow the complainants to come in on Sundays at straight time to replace the Friday night shift, or to allow the complainants to work up until sunset and then be replaced or to work extra hours during the week at straight time to compensate. Mr. Roosma testified that from the time of his religious conversion until his termination of employment at Ford, he did not receive complaints either from supervisors or from co-workers about problems experienced due to his unauthorized absence from a Friday night shift.

Based on his own experience and observation, workers at the Ford plant were regularly taken from their assigned jobs and put on a different job. Sometimes workers switched jobs just to add variety to their work without being requested or assigned to the switch by the foreman. Workers who were assigned to new jobs on the assembly line are granted up to three days training time before being expected to work at production speed. Mr. Roosma is of the view that diligent workers with a positive attitude towards their work typically learn the jobs much quicker than that. He referred to training an individual to do his gas-tank installing job in two hours.

The complainants testified that they approached Don Ferguson and Davey Hall on almost a weekly basis right up until the time they were terminated. They would typically ask if they could receive Friday night off or if the Union representative knew of anyone who wanted to switch for the Friday nights. The response that they regularly received was by way of reference to the collective agreement and the concern that if they were treated exceptionally by being given Friday nights off then everybody else would want the same treatment.

Mr. Roosma was invited to attend a meeting of the membership of local 707 concerning his circumstances. That letter, dated February 26, 1986, was from Mr. Van Gaal who at that time was the vice-president of the local. Mr.

Roosma testified that he did not attend the meeting because he thought it would be like "Daniel in the lion's den" and the Union already knew that he had filed a complaint almost one and a half years before. He does not recall even replying to the letter.

In cross-examination, counsel for the respondent Company questioned Mr. Roosma on the teachings of the Worldwide Church of God concerning the segregation of the races after the anticipated return to earth of Jesus Christ and the church's position on the appropriate and desirable roles of husbands and wives in a marital relationship. Counsel for the Commission objected to this line of questioning and I was asked to make a ruling. The argument for the Company had two major premises and a third minor premise.

The first major premise was that the line of questioning being pursued was relative to remedy because a board of inquiry has discretion not to award a remedy, even where it finds that a complainant has suffered discrimination and even if it finds that damages have also been suffered consequent to that discrimination. Counsel also argued again, on this first premise, that the line of questioning was relevant to remedy because the board's discretion should be exercises against awarding a remedy where the creed that is the basis of the claim for protection itself fails to accord the substantial rights and values upheld by the Ontario Human Rights Code. Counsel likens this argument to that developed under the "Clean Hands Doctrine", which applies at equity to one seeking an equitable remedy and which can bar the grant of a remedy to which the claimant would otherwise have been entitled.

The second ground of argument by counsel for the respondent Company was that the line of questioning was relevant to both liability and remedy on the question of the duty to accommodate and the concurrent issue of undue hardship. In support of this second ground, counsel argued that this question of accommodation and undue hardship depended on the consideration of all the circumstances, that these circumstances should include the nature of the claim for protection and the employer's own value system. Consequently, it was argued, in taking steps to accommodate a

complainant's creed, an employer should be entitled to assert or impose its own values, rather than subsidizing a value that is repugnant to its own and to the value system promoted and upheld by the Code. The third argument, which I have characterized as a minor premise, is that because these arguments are new they should be permitted to go on the record for the benefit of any further proceedings that might ensue in respect of these complaints.

Dealing with the last point first, I recognize that it might be an easy way out for someone in the position of this Board to rule simply that the evidence should go on the record because some other body may be looking at it later on. But I believed it would be an abdication of my responsibility to make the decision on that basis and so I ruled on the relevance on the line of questioning being pursued by counsel for the respondent Company in terms of the first two arguments.

In support of the first argument, counsel cited the decision of the Saskatchewan Court of Appeal in the case of Saskatchewan Human Rights Commission v. Citation Investments Limited Cudlow Holdings Limited and Quadra Investments Limited, reported at vol. 8 of the Canadian Human Rights Reporter, page D/4166, a decision of August, 1987. In that case, a board of inquiry appointed under the Saskatchewan Human Rights Legislation had ruled that three landlords had discriminated against tenants because of their marital status, but then did not allow compensation for the discrimination. A number of points are noteworthy about this decision and I focused on four of them. The first is that the complaints were there initiated by the Saskatchewan Human Rights Commission. The second is that the board did actually award a remedy by ordering each respondent to provide a written undertaking "that it will comply with section 11(1)(b) of the Human Rights Code in the future" (para. 32932 at p. D/4167). The third point is that the board did decline to order that the corporations compensate the single tenants for the difference between what they actually paid and what they would have paid had they been married. However, the board simply stated that it was not prepared to award compensation on the facts of the case and did not given any reasons for the refusal. The fourth point is that the Saskatchewan Court of

Appeal did not simply say that the board had a discretion; it went on to consider how that discretion ought to be exercised and found that the law was clear that the discretion of the board of inquiry had to be exercised according to law.

I noted the following from para. 32936 and para. 32937:

> ... The Board, in the exercise of its discretion, must therefore do so in accordance with the policy and objects of the Code. It would have been preferable for the Board to have enunciated the reasons for not awarding compensation in these circumstances. We point out however, that this case proceeded on an agreed statement of facts and it is apparent, from a reading of those facts and the award, that the respondents did not intend to discriminate against the named persons, set the rates in good faith, admitted the violation when advised of it, the rental policy had been approved by another governmental agency and agreed to change the rental policy in order to conform with the policies and objectives of the Act. It is also worth noting that the amount of compensation claimed on behalf of each individual tenant was very small. Those are all factors which the Board could have taken into account in declining to award compensation... .
>
> ... The appellant contends that once a finding of discrimination has been made by the Board and it is proved that damage has been suffered, the Board has no discretion but to award compensation. We do not agree. While one might expect that the Board, in circumstances such as those which exist here, would award compensation, it can, in the lawful exercise of its discretion decline to do so. Here there were facts on which it could have so declined and we are not persuaded that the Board did not exercise its discretion according to law. It is implicit from what we have said that the Board should, in proper circumstances, award compensation... .

On my reading of this decision, it appeared to add little to the respondent Company's argument.

Section 40 of the Ontario Human Rights Code, one of the authorities also adduced in argument on this point, deals with the discretion of a board of inquiry operating under the Code and uses the language of discretion at subsection (i) by stipulating:

> "Where the Board of Inquiry, after a hearing, finds the right of a complainant under part 1 has been infringed, and that the infringement is a contravention of section 8 by a party to the proceeding the Board **may** by order:..." (emphasis mine).

Consequently, it is clear that discretion is given under section 40 and I concluded that the decision of the Saskatchewan Court of Appeal, cited above, is relevant because it focuses on the policy and objects of the Code it order to determine how the discretion granted under section 40 should be exercised.

In arguing on the point, counsel for both the respondent Company and the Human Rights Commission made reference to the policy and objects or what might be called the value system of the Ontario Human Rights Code. Reference was made to the preamble of the Code:

> Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, and is in accord with the universal declaration of human rights as proclaimed by the United Nations ...
>
> And whereas it is public policy in Ontario to recognize the dignity and the worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim, the creation of a climate of understanding and mutual respect for the dignity and worth of each person, so that each person feels a part of the community and able to contribute fully to the development and well being of the community and the province.
>
> And whereas these principles have been confirmed in Ontario by a number of enactments of the legislature and it is desirable to revise and extend the protection of human rights in Ontario.
>
> Therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario enacts as follows...

Reference was also made by counsel for the respondent Company to section 28 of the Code and the functions of the Commission which are enshrined therein. I refer to six of the paragraphs under section 28 which I thought particularly relevant to that argument. Section 28 says:

> It is the function of the Commission,
>
> (Para A)
> To forward the policy that the dignity and worth of every person be recognized and that equal rights and opportunities be provided without discrimination that is contrary to law.

(Para B)
To promote an understanding and acceptance of and compliance with this Act.

(Para D)
To develop and conduct programs of public information and education and undertake, direct and encourage research designed to eliminate discriminatory practices that infringe rights under this Act.

(Para F)
To enquire into incidents of, and conditions leading or tending to lead to, tension or conflict based upon identification by a prohibited ground of discrimination and take appropriate action to eliminate the source of tension or conflict.

(Para G)
To initiate investigations into problems based upon identification by a prohibited ground of discrimination that may arise in a community and encourage and co-ordinate plans, programs and activities to reduce or prevent such problems.

(Para H)
To promote, assist and encourage public municipal or private agencies, organizations, groups or persons to engage in programs to alleviate tensions and conflicts, based upon identification by a prohibited ground of discrimination.

The substance of the respondent Company's argument was that if the Company could show that the complainants' creed, which is largely the foundation for their claim in this case, was itself counter in some respects to the values revealed by the Code, the complainants should be barred from a remedy because they failed to come with clean hands. On the surface, this argument has some attraction. The metaphor is a highly visual one; who, after all, would wish to make an award to a plaintiff with dirty hands? However, one must go below the surface of the analogy to test its aptness.

The Clean Hands Doctrine is an equitable doctrine, which is to say it is part of that body of law which grew out of the jurisdiction of the English Court of Chancery. It was a large part of the function of that body of law to mitigate both the severity and the intractability of the common law. The orientation of equity as a body of law was private and not public. In other words, it was to govern the relations between private individuals, rather than between individuals and the state.

As a body of law, equity is not a mixture of vague notions or abstract principles. It proceeds along reasonably precise and well-established lines. So to turn to the Clean Hands Doctrine, for example, as it would operate in a private contract between two individuals, let us suppose that in that private contract between two individuals, one seeks an equitable remedy within that contractual relationship and the other party claims that the remedy sought at equity should be barred because the claimant lacks clean hands. What would that argument mean or depend on?

In the first place, it would not simply mean that the party claiming the remedy was generally a rogue or charlatan with a notoriously deficient and unprincipled approach to business practices and ethics. It would not even mean, secondly, that in a similar contract with somebody else, a third party, the claimant had himself, or herself, violated the very principles of contract law which he or she now sought to have upheld in the contract at issue. Indeed, in order to invoke successfully the equitable Doctrine of Clean Hands, the party to the contractual relationship would have to show that, in that contractual relationship, the claimant had acted inequitably which respect to that contract and that other contracting party.

Therefore, applying the analogy to the line of questioning pursued by the counsel for the respondent Company and his justification for it, counsel's line of questioning does not go to establishing that the complainants have, themselves, acted in violation of the Ontario Human Rights Code in respect of their employment relationship with the employer. Nor does it go to establishing that the complainants have violated the spirit or policy or objects or values of the Code in respect of their employment relationship with the employer. Instead, it goes to establishing that the complainants' beliefs and the doctrines of their creed promote a domestic relationship whose practices and values are at odds with those set out in the Code. On balance, I concluded that I could not accept that the analogy was relevant. In the first place, the Ontario Human Rights Code does embody a value, but it does not purport to impose that value system on every aspect of social life and behaviour, even when that behaviour would be thought odious and offensive by any right thinking citizen of Ontario. There is a tension in the social fabric of Ontario among various rights and obligations claimed and imposed

on its citizens. The examples of how that tension is created and maintained are numerous. One need only think of the Canadian Charter of Rights and Freedoms or even consider s. 23(a) of the Ontario Human Rights Code. The Code is part of the legislative regulation of that tension in its provision for freedom from discrimination on certain grounds. It does not provide for freedom from discrimination or the right not to be discriminated against in every respect. Instead, the areas of prohibited discrimination are set out in part 1 of the Code.

Secondly, I concluded that the respondent Company had no mandate to step outside its role as employer and claim to be a guardian of the values enshrined in the Code. Consequently, I concluded on the first ground of argument presented by Ford that counsel's line of questioning was not relevant to remedy in the manner claimed.

The second ground of argument advanced by Ford was that any duty to accommodate and any notion of undue hardship must depend on all the circumstances and that these circumstances include the values of the employer as against the values of the complainants which it considers repugnant to its own and to the value system upheld and promoted by the Code. I addressed this argument by returning to the fundamental context of the complaints, which is the employment relationship between the complainants and the Company. It was open to it as an employer to argue that the beliefs of the Worldwide Church of God do not constitute a creed. It was open to the employer to argue that the beliefs of the complainants are not sincerely held, however, it appeared to me, on balance, that I was being asked to decide on the general compatibility of the values enshrined in the Worldwide Church of God's creed, in the value system of the employer and in the value system of the Code.

I considered it significant that the Code speaks of rights and not values. In speaking of rights, it obviously reflects values, but the Code establishes a rights hierarchy in certain areas. It is clear, for example, that employers are not unfettered in the manner by which they go about employing; the Code has something to say about that. However, the Ontario Human Rights Code does not require of an employer or an employee that the values which they promote,

uphold and reflect in all aspects of their social and commercial lives should conform to those reflected by the Code itself. The Code's legal force is only in respect of those designated areas and prohibited grounds. Of course, this cuts both ways. Employees, no less than employers, are allowed spheres of activities which go unregulated under the Code.

I also considered the Company's argument from a policy standpoint, noting that I am obliged, under s. 38(1) to hold a hearing to determine whether a right of the complainants under this Act has been infringed. Nowhere, neither in the case authorities or in the legislation, am I directed to hold a hearing to inquire into the hierarchy of values rather than the hierarchy of rights or the infringement of rights.

It concerned me that to allow this line of questioning may have two undesirable effects. The first is that it might have a chilling effect on legitimate complaints although I made that observation without intending any reference to the particular complaints at issue here. Complainants who are guaranteed freedom from discrimination in certain respects on the basis of creed might well be deterred from pursuing complaints, even when believing their rights have been infringed, if they are to be subject, in cross-examination, to arguments about the values which they uphold generally and how those values are promoted in aspects of their lives other than those directly under scrutiny in the context of an employment discrimination complainant.

Counsel for Ford referred to the undue hardship which might arise, given the doctrines of the Worldwide Church of God, according to which citizens of a particular race would be required as a tenet of that faith, and depending on the unfolding of future events as prophesied by that faith, to return to their countries or continents of racial origin and that members of those racial and ethnic groups who might work in the employ of the respondent Company, would have feelings of community put at risk and that this is contrary to the values set out in the preamble of the Code.

I accepted that this may be the case. However, to get to the second policy ground for my decision, it seemed to me that many religious beliefs may, in some sense, be considered anti-communitarian. The notion of a creed and the notion of religious belief frequently, if not inevitably, involve considerations of one's ultimate destiny, not just in human chronological and historical terms but also in terms of an afterlife. Many of those beliefs and contemplations are predicated on a division among people. Many of them are predicated on a view that the treatment that will be accorded to all of us in the afterlife will be vastly different, depending on the tenets of religious faith that we have observed, or perhaps on the activities that we have pursued.

There is no doubt that debates about the veracity of beliefs, the beliefs themselves, and their implications can be the cause of argument, consternation, bad feeling and perhaps even discord. To that extent, they may be considered anti-communitarian. They may be considered divisive. Nonetheless, the right to hold religious views, to believe in a creed, is a right enshrined both under the Ontario Human Rights Code and elsewhere in the law governing the citizens of Ontario.

Without very clear direction under the Code, it would, in my conclusion, be undesirable and, indeed, invidious to ask the Board to assume the role of deciding which values are compatible at a general level. Consequently, it was my conclusion that on the second ground of argument put forward by counsel for Ford the line of questioning was nonetheless irrelevant. I emphasize that the decision I reached on this issue was a difficult one because the arguments were novel and in some respects ingenious. However, I concluded that it was not a proper exercise of my discretion, within the ambit of the Code, to allow the line of questioning to be followed but consider it important to have incorporated the rationale for my decision into these reasons.

In cross-examination, Mr. Roosma was asked whether his payment to other workers of money and gift certificates in consideration of their working his Friday nights shifts was a practice that accorded with the Worldwide Church of God's

teaching on Sabbath observance. Mr. Roosma responded that he did not feel comfortable with the payment of money and gift certificates once he discovered that the Company disapproved of it but that he was not responsible for anyone else's decision to work on his Sabbath.

Mr. Roosma confirmed that he and Mr. Weller told the Company, in October or November of 1984, that their religious beliefs required absolute adherence to the Sabbath and that the requirement that they work two weeks out of four on the night shift would create a conflict. Counsel for the Company suggested to Mr. Roosma that Ted Stawikowski and Frank Wiley had responded to by suggesting that the complainants come in on Friday nights ready and would be let go if possibly but that they should be prepared to work if needed. Mr. Roosma emphatically denied that this had been their response. Mr. Roosma was also asked to review the amended complaint that he filed with the Ontario Human Rights Commission and was asked to confirm that his allegation was "that on or about November, 1984, the Respondent contravened a provision of The Human Rights Code...". He was also asked about the further amendment to his complaint in October, 1986 and the fact that November 1984 is still the identified time at which the Company, having heard his dilemma, decided that it could not excuse him from Friday night shiftwork.

Mr. Roosma conceded that two absentee allowances were assigned to his zone because of the importance of keeping the assembly line moving and of avoiding mass relief. Counsel to the Company suggested that if both absentee allowances in the zone were assigned to cover the complainants' positions while they were absent from the Friday night shift there would be no absentee allowances to cover the absences of other people. Mr. Roosma suggested that the Company could transfer someone from another zone who knew his job. When challenged by the Company to acknowledge that a hire that usual absentee rate in another zone might equally require the transfer of absentee allowance personnel from zone C to a different zone, Mr. Roosma replied that he was not sure of the absentee rates and how bad they were. Mr. Roosma also acknowledged that Ford Motor Company tried hard to avoid going on mass relief because of the expense of shutting down the assembly line.

Under cross-examination by Counsel for Ford, Mr. Roosma agreed that he initially believed that the labour gang worked straight days when he proposed that he and Mr. Weller be shifted to it as a solution to the conflict with their Sabbath observance. He subsequently discovered that the labour gang works three shifts and that these rotate through Friday nights so that he would not have been able to work all three shifts on the labour gang. He therefore subsequently suggested that he and Mr. Weller could work on the labour gang when necessary to avoid conflicting with their Sabbath observance. Mr. Roosma also agreed that he had suggested working in maintenance as a solution but was not sure what job he might be able to do there or whether there were any unskilled helpers in the maintenance department.

Counsel for Ford put it to Mr. Roosma that he had been advised that the Company would withhold imposing discipline on him for some time while a solution was searched for. However, Mr. Roosma denied that he or Mr. Weller were ever told that disciplinary action was going to be put on hold. Mr. Roosma did agree that neither he nor Mr. Weller knew very much about the job classification system at Ford and said that he approached the Company and the Union on the basis that they were in a better position to advise him about a possible solution then he was in identifying one himself.

Under cross-examination by Counsel for the Respondent Union, Mr. Roosma agreed that he had never sought dispensation from his Minister concerning Friday night Sabbath observance. In his view, he was obliged as a believing member of the Worldwide Church of God to honour God's Sabbath and there could probably be no dispensation from this requirement. Mr. Roosma also confirmed that his original complaint did not name the Union as a Respondent and that the Union was not added until August 29, 1985. At a conciliation meeting in January 1986, Mr. Roosma stated that he wanted the Union to "go to bat for him" even if that went going against the Collective Agreement. Mr. Roosma was asked pointedly whether he expected his fellow employees to give up their seniority rights in order to accommodate him. He responded in the negative, emphasizing that, in his view, the issue was two-sided because he also had the right to freedom of religion under the Collective Agreement. Mr. Roosma also emphasized that he would have been prepared to

train people on his job on his own time and without pay in order to facilitate being replaced by another worker on the Friday evening shifts. In 1986, Mr. Roosma took a fourteen day leave of absence to celebrate Passover and the Feast of Unleavened Bread. By taking a leave of absence, he was able to avoid any confrontation over his inability to work due to his religious beliefs and to avoid any resulting discipline. At no time did he receive any complaints from Company officials about any problems experienced during his absences from work on Feast days.

Robert Weller started working for the Ford Motor Company in September 1977 until his employment was terminated in August 1988. As a member of the Worldwide Church of God, he too believes that he is required to rest on the Sabbath and to refrain from working or pursuing his own pleasure. The obligation to keep the Sabbath is, in his view, a commandment from God and to willfully break it would result in eternal death. Mr. Weller testified that since becoming a believer in the Worldwide Church of God he has not worked on any Sabbath.

Mr. Weller confirmed the holy days observed by members of the Worldwide Church of God and on which they would be unable to work due to their religious convictions. These include the first and last days of the seven Days of Unleavened Bread although these would not occur on the same day of the week from year to year because the Worldwide Church of God observes the Hebrew rather than the Roman calendar. The Day of Pentecost is also a holy day but it always falls on a Sunday and therefore has no implications for the complainants' ability to work their assigned shifts. In the early fall, the Worldwide Church of God celebrates the Feast of Trumpets which is a one day celebration during which they are not to work. This is followed by the Day of Atonement when work is also forbidden but both the Feast of Trumpets and the Day of Atonement also fall on different days from year to year and would occasionally fall on a weekend. Finally, there is the Feast of Tabernacles which is a seven day feast followed by the "Last Great Day". Adherents are forbidden from working on the first day of the Feast of Tabernacles or on the Last Great Day. The dates of these two days will vary as well; however, it is traditional for members of the church to assemble for the full eight

days of the Feast of Tabernacles with their families. Mr. Weller himself has done this at several of the assigned church sites including Niagara Falls, St. Petersburg, Florida, and Pasadena, California.

Mr. Weller also testified that he was under no obligation as a member of the Worldwide Church of God to try and convince others to join the church. Indeed, his wife, whom he married before becoming to believe in the Worldwide Church of God, is not a member of the church and he is equally under no obligation to try to convince her to join. He is raising his child within the church.

Mr. Weller also testified to his belief concerning those who work at Ford and who, not believing in the teachings of the Worldwide Church of God, work on Friday nights after sunset. Mr. Weller indicated that, according to the beliefs of the Worldwide Church of God, such people would all be given the opportunity after death to repent and to obtain eternal life by accepting God's word. However, Mr. Weller emphasized that if he as a believer now broke God's law and worked on the Sabbath, he would have no opportunity to repent because he is being judged now.

Mr. Weller first started observing the Sabbath in mid- to late November 1984. He attended his first Sabbath service in St. Catharines and was accompanied by Michael Roosma. He described himself as a "prospective member" until he was baptized into the Church in June 1987. He emphasized that he has maintained his Sabbath observance from November 1984 until his baptizism and right up until the time of testifying.

During his years at the Ford assemby plant, Mr. Weller performed tasks under 43 different job classifications including spot welding in the body build department; stocking and sealing parts on a sub-assembly line; sub-assembling wheel housings; welding the wheel housing and the underbody of the vehicle; securing steel runners on the underbody of the vehicle; welding quarterpanels; sanding cars in the paint department; summer shutdown clean-up work; assembling parts in the chassis department; securing the brakeline; installing heatshields; stocking work stations; installing motor mount

assemblies; connecting gas tank hoses; connecting brake cables; securing side mouldings; assembling the stick shifts; trunk repair; connecting airconditioning hoses; hooking up exhaust systems; assembling bumpers; securing sway bars; assembling brakelines; wheel balance assembly; adjusting carberators; assembling alternators; assembling windows; testing cars under water pressure for leaks; removing masking tape; unloading railway cars; and assembling wheel nuts. Most of these jobs were worked at by Mr. Weller for relatively brief periods and certainly briefer than the time he spent as a gas tank installer. However, he testified that he managed to get up to production speed relatively quicky, sometimes within an hour and seldom longer than half a day. The single exception was the job of assembling shock absorbers and installing them on vehicles in the chassis department. In that job he was required to put some circular parts into a press together with the shock so that the shock would be compressed and the parts would secure at the same time. However, Mr. Weller has to read the teletype to see which model was coming down the line because different shocks went on different vehicles. He would be required to organize a series of shock absorbers in advance so that he would have them ready in sequence and he was also required to place a shock absorber under the front wheel well and secure it with a couple of bolts to the top of the engine compartment. He tried it for two days but never reached production speed because it was difficult job. He testified that he "just couldn't get the knack of it".

Mr. Weller also refered to some "K14" jobs that he had done. According to his testimony, "K14" refers to a medical permit which prescribes certain restrictions on work activities. Workers who experience medical problems report either to their personal physicians or to the physician at the plant and, if they received written confirmation that certain restrictions should be imposed on their work, they take the physician's written notes to the labour relations department. Labour Relations then would keep a copy of the physician's note and the other copy would go to the worker's supervisor who would assign the appropriate job in light of the restrictions. In Mr. Weller's experience, the supervisor would find something for him to do quite quickly under such circumstances.

Mr. Weller also echoed Mr. Roosma's testimony that he would have been prepared to anything reasonable to make it possible to avoid working on his Sabbath. He confirmed that their supervisor, John Sokic, had said he could not help them when they asked for Friday nights off to keep the Sabbath. Very shortly thereafter he and Mr. Roosma went to see Frank Wiley at his office near the front of the plant. The head of Labour Relations, Max MacLean, was also present. Mr. Wiley explained that the plant was geared for production and there was not much he could do because the complainants did not have sufficient seniority under the collective agreement to qualify for work on the labour gang. Mr. Weller then described how he and Mr. Roosma decided to next pursue their options with the Union. At the suggestion of their shop steward, Davey Hall, they dropped in to see the president of Local 707 at the time, Bryan Feil. As Mr. Roosma had testified, Mr. Feil was not available but the complainants met with the vice-president, Bill Van Gaal. They again suggested the labour gang as an alternative to working on Friday nights and also said they would be willing to work extra hours either in between shifts or after shifts. Mr. Weller testified that Mr. Van Gaal's response was similar to Mr. Wiley's: he referred to the collective agreement and also said that if the complainants were given Friday nights off other religious people might want them off as well. He had no suggestions about how they could solve their problem not did he suggest that they come back and see him if they required further advice.

After meeting with Mr. Van Gaal, Mr. Weller decided that he would approach a friend Shaunne Melnyk, who worked in the Labour Relations department at Ford. He visited him in his office within a day or so of speaking with Mr. Van Gaal. According to Mr. Weller, Mr. Melnyk responded that he believed that others had been in similar circumstances at another Ford plant and that he would check the situation and get back to Mr. Weller. A few days later, when Mr. Weller contacted Mr. Melnyk by telephone, he was told that the Company could not accommodate him because it would set a precedent.

Mr. Weller also testified regarding the disciplinary process at Ford. He also understood that he would be disciplined if he was away without authorization on two working days in twenty consecutive working days. He believes

that he heard of this policy first from the shop steward, Davey Hall, and that the policy came up during on of his formal interviews with the supervisor present and the Company representative did not deny the practice. Mr. Weller said that the first stage of the discipline process involved his supervisor approaching him and asking why he had been off work on a particular day. Having heard the explanation, the supervisor was then to advise Mr. Weller whether his absence was authorized or unauthorized. Whether there had been two such unauthorized absences in twenty days, the supervisor would inform Mr. Weller that there was to be a formal interview. This interview would be convened without very much notice to Mr. Weller in the supervisor's office. Mr Weller would have a Union representative present and the Company representative, usually the foreman, would also be present. Mr. Weller would again be given the opportunity to explain himself but if this was not acceptable to the Company representative, he would state that the absences were unauthorized and Mr. Weller would be told to go back to his job. Both the Union and Company representative would make notes during the interview. Afterwards, Mr. Weller would be advised of the disciplinary steps that were to be taken. The first of these steps is a verbal warning, followed by a written warning, then a one day suspension without pay, then three days suspension without pay, then seven days suspension without pay, then fourteen days suspension without pay, then twenty-eight days suspension without pay, and, finally after twenty-eight days suspension, if the worker takes one more unauthorized day off, termination will follow.

Mr. Weller went through each stage of the disciplinary process as he continued to refrain from working on his assigned Friday evening shifts and was ultimately terminated in August, 1988. Mr. Weller actually asked the Union to file a grievance arising out of his termation and the Union did so. However, the foundation for the grievance was not Mr. Weller's religious beliefs but a claim that one of his absences was for medical reasons and that an additional ground for discipline in one instance, lateness,was unfounded.

Mr. Weller also testified that he, like Mr. Roosma, had visited the supervisor's office and spoken with a number of Union officials including Jim Donegan, committeman Ferguson and shop steward Davey Hall. He asked them if the Union

would grieve his suspensions according to the collective agreement's guarantee of freedom of religion. Mr. Donegan told him that such a grievance would not go through and they could not take it. Mr. Weller believes he had this conversation after his three day and seven day suspensions and that he raised the matter again with Davey Hall after his fourteen day suspension. Mr. Hall simply reminded him of the meeting in the supervisor's office and the message given then by Mr. Donegan.

Mr. Weller does not believe there was a single week in which he was assigned to a Friday night shift when he did not give his supervisors advance warning that he would not be coming in. Generally, he recalls that he would tell his supervisor that he would not be attending on Friday night at the beginning of that week. In each case, Mr. Weller would ask for permission to take the Friday night off as a prelude to advising his supervisor that he could not attend.

After joining the Worldwide Church of God, Mr. Weller did ask the Company for leaves of absence to enable his to participate in other holy days and those were frequently granted. For example, in 1985 he took a leave of absence to celebrate the Days of Unleavened Bread and this request was approved by his supervisor, Ben Lima. Indeed, the only occasion on which Mr. Weller was sure that a leave of absence request was denied was in 1985 when he sought leave to celebrate the Feast of Tabernacles. He asked committeeman Don Ferguson why his request was denied and was told that at that time of year a number of people like to go hunting. Mr. Weller asked Mr. Ferguson to check to see how many people were going to be on leave and it transpired that not as many people were going to be out as the supervisor and foreman had originally thought and so Mr. Weller was invited to submit another application. He did so and the leave of absence was granted.

Around March 1985, Mr. Weller arranged to change shifts with another worker so that he would not have to work on Friday nights. Mr. John Anthony performed the gas tank installer's job on the shift opposite to Mr. Weller's and a similar switch was made with Mr. Roosma and the person on the opposite shift who did his job. This arrangement was

facilitated by the shop steward, Davey Hall, who went to speak to the man on the opposite shift and advised Mr. Weller and Mr. Roosma that they would be willing to switch but they would have to "sweeten the pot". The complainants concluded that a figure of $55 should be sufficient an incentive because it was roughly equivalent to the shift premium. Mr. Weller testified that both he and Mr. Roosma gave Mr Hall envelopes with $55 in them and Mr. Hall agreed to give the money to the two men on the other shift.

According to this arrangment, the complainants reported for work at 6:30 on Thursday evening and worked until the end of the shift at 5:00 the next morning. They then took the places of the other men on the day shift and began working again two hours later at 7:00 a.m. and finished at 3:30 p.m in the afternoon. The difference in time arises out of the fact that the night shift was ten hours and the Friday day shift is only eight hours. The complainants let their supervisor know that they were going to make this change and Mr. Weller believes that the supervisor agreed that the switch could be made. However, Mr. Weller also found the experience extremely exhausting, particularly because he found the adjustment to the night shift difficult in any event and had not been sleeping properly that week. Mr. Weller testified that he found this experience much more difficult than doing a "double-backs" which occurs when someone working the eight hour Friday day shift continues and works the eight hour Friday night shift. Mr. Weller had done such double-backs before converting to the Worldwide Church of God and said that he found them bearable compared to working a Thursday night shift and then the Friday day shift.

In light of these difficulties, Mr. Weller did not see this arrangement with Mr. Anthony as a workable long term solution. He did arrange to change shifts with Mr. Anthony again later in 1985 after hearing that Mr. Anthony wanted to work nights on a steady basis. Consequently, for several months up until January 1986, Mr. Weller worked straight days and Mr. Anthony worked straight nights. The Company had told Davey Hall that there was to be no more exchanging of money under such circumstances so, in consideration of the switch, Mr. Weller gave Mr. Anthony gift certificates from a grocery store. Mr. Weller paid Mr. Anthony $75 in gift certificates for every week of the special

arrangement. This amount increased, at Mr. Anthony's request, to $100 a week and came to an end in January 1986 when Mr. Anthony decided he did not want to continue the arrangement.

Mr. Weller recalls informing Bob Williams, the Union steward on Mr. Anthony's regular shift, that he was exchanging gift certificates but does not recall that Mr. Williams had any particular reaction. Mr. Weller did get permission from his supervisor for this arrangement and ineffectually interupted the discipline process that was being applied to him.

Towards the end of spring or beginning of summer in 1988, Mr. Weller was working on "left hand sway bar secure" in the chassis department. The repairman on his shift suggested that a Mr. Fulford might be willing to switch shifts with him and Mr. Weller was particularly interested because he was running into significant discipline. Mr. Weller approached Bob Fulford and told him of his dilemna, offering to pay him $30 if he would switch with him on a Friday shift. As Mr. Weller recalls, the next step in discipline for him would have been termination. Mr. Weller also asked his supervisor, Glen Currie, whether he could switch shifts with Mr. Fulford, but permission was denied. However, Mr. Currie did not give Mr Weller any reason and so when the Friday came, Mr. Weller, who had just come off a Thursday night shift, reported for work at 7:00 a.m. At this point, a Labour Relations representative approached Mr. Weller and told him he was not supposed to be on the job but Mr. Weller advised him that he intended to continue and that Mr. Fulford was coming in to do his job on the evening shift. After a renewed request, Mr. Weller went off the line to the supervisor's office where he met with the shift supervisor, Mr. Servio, Shaunne Melnyk and another Labour Relations representative. Mr. Weller did not wish to discuss the matter until a Union representative arrived and they were subsequently joined by the committeeman, Don Ferguson and the shop steward on that shift, Bob Williams. Mr. Ferguson and Mr. Williams then went into the supervisor's office leaving Mr. Weller waiting outside when Mr. Ferguson reappeared he advised Mr. Weller that was to go back on the job but in the meantime, Mr. Fulford had arrived. Mr. Weller testified that he apologized to Mr. Fulford for his having been "dragged out of bed" and offered him a further $10 for gas money and inconvenience. Mr. Ferguson encouraged Mr. Weller to give Mr. Fulford the $10 and then Mr. Weller finished the shift.

Shortly thereafter, Mr. Weller tried to get Mr. Fulford to switch shifts with him again. This was also to be an arrangement whereby Mr. Weller would work Thursday night and then two hours later begin the Friday day shift in place of Mr. Fulford who would then come in and work the night shift for Mr. Weller. Mr. Weller arranged to meet Mr. Fulford in Oakville and paid him $60.

On the Thursday evening, while Mr. Weller was working the night shift, Mr. Fulford appeared and told him he was not going to be able to work the Friday night after all because it was a long weekend and he was going away. Mr. Weller testified that he told Mr. Fulford that he could not see that there was much he could do but offered to work his day shift for him in any event and that there was no need to give him back the money that he had given him. Mr. Fulford took advantage of that offer and left. The next day Mr. Weller worked the day shift and went to see his supervisor before work started on the Friday evening shift. The supervisor, Gerry Drozd, asked Mr. Weller whether he was "coming or going" and Mr. Weller advised him that he had already worked and was planning to go home but that "my services are available if you need me". Mr. Drozd asked him to hold on while he talked to somebody on the phone and when he got off he said "we could use you". Consequently, Mr. Weller worked for another three and a half hours before Mr. Drozd gave him permission to leave. Mr. Weller testified that he "felt crazy" but continuted to work because otherwise he was "going to get fired".

Mr. Weller tried to make one other switching arrangement prior to his termination. The gas tank installer's job was being performed by Ken Tracey and, in 1988, Mr. Weller approached him and asked if he would be willing to switch. He also offered to compensate Mr. Tracey who responded that extra compensation would not be necessary and he would be glad to help. In preparation for the switch Mr. Weller came in to learn the job since he had not previously actually installed gas tanks but had only assisted the installer. The proposed arrangment was to be a fairly complicated one because Mr. Tracey and Mr. Weller were actually on the same shift. It became possible because a job had opened up on the other shift, the "A" shift, on "right hand sway bar secure". Mr. Weller told the supervisor on "A" shift, Mr Servio,

that he would like to have that job and also cleared it with his committeeman Mr. Ferguson who agreed. The idea was that if Mr. Weller obtained that job on the "A" shift, and Mr. Tracey stayed on the "B" shift, then they could arrange a switch to cover Mr. Weller's Sabbath. Mr. Weller testified that he did not eventually get the job on the "A" shift. Mr. Weller emphasized that he had not applied in writing for the position because he did not believe he had to and because Mr. Ferguson, who knew all along that he wanted the job, told him that he had it.

Mr. Weller had previously advised the Company of his plans by telling Glen Currie, the general foreman on the "B" shift, that he would be switching with Mr. Tracey after he went to the other job. He was advised then that the Company would not let him do so but said that their reasoning -- that they had a high rate of absenteeism -- did not make sense to him because he could not see what difference the switch would make. Consequently, Mr. Weller waited until the last Friday that he was scheduled to work nights and went in on the day shift that day to take up the sway bar secure job. A gentleman whom Mr. Weller believes was named Tony was doing the right hand sway bar secure job and Mr. Weller told him that the job was his. Mr. Weller therefore started doing the job and the other man started working with him. Shortly thereafter, Mr. Weller was called off the job by Greg Katchanoski, a Company Labour Relations representative, and Don Ferguson. Mr. Weller informed them that he believed the job was his and he was reporting for duty and added that the Company knew he was to be fired if he could not do that job. Mr. Ferguson conferred with Mr. Katchanowski and then informed Mr. Weller that Mr. Katchanowski was not going to let him stay. Mr. Weller claims that he asked Mr. Ferguson whether he was going to help him given that he was about to be fired and Mr. Ferguson said "no". At about this point, Mr. Weller, who was wearing running shoes because he had had a badly infected toes for several weeks stubbed his toe on the platform which caused it to bleed. Mr. Weller subsequently left and did not come in for the night shift and has grieved his dismissal over that Friday night absence because of the injury to his foot.

Mr. Weller acknowledged that he did not have anything in writing from the Company to say that he had been assigned to the right hand sway bar secure job. However, out of the many jobs that he had at Ford Motor Company over

almost eleven years, and which were described above, he recalls only having to sign documents for three. In his experience, it was not typical to receive written confirmation.

Mr. Weller was asked in cross-examination whether he would wish anyone's seniority rights to be compromised or denied in order to accommodate him. He replied that he did not wish anyone's seniority rights to be compromised just as he did not wish his rights of religious observance to be compromised. He further stated that, in light of his consideration of the circumstances, he did not believe that anyone's seniority rights would be compromised. He expressed willingness to move down the bottom of the seniority ladder and to take a job with lower pay if that was necessary to enable him to maintain his religious observance.

Mr. Weller stated that he wished the Company and the Union to "bend" the collective aggreement or amend it in order to accommodate him. He was asked whether he would insist on such an amendment if, in order to accommodate him, the rights of others had to be compromised. In particular, he was asked whether he would continue to advocate amendment to the collective agreement but the only way he could be accommodated would be to change the seniority system so that he was given a kind of super seniority. Mr. Weller responded that he did not think the situation would ever have come to that if the parties had come together to try and address the situation, especially in light of his own willingness to take even a lower seniority or lower paying position in order to avoid working Friday nights.

Counsel for the respondent Union asked Mr. Weller to confirm whether, in discussions with representatives of the Company and the Union concerning a permanent leave of absence for Friday nights, there was some concern expressed that adherents of other religions might also seek similar accommodation. Mr. Weller acknowledged that the possibility that other workers would seek accommodation for Friday nights was mentioned but that he did not personally feel it was a genuine concern. As far as he was concerned, he and Mr. Roosma were the only ones making the request. Mr. Weller was also asked about the invitation that he received to the Union meeting held on March 23, 1986 and the office of

C.A.W. Local 707 in Oakville. That invitation was received in a letter from Mr. Van Gaal dated February 26, 1986 and whose second paragraph stated "you are urged to attend this meeting, as there will be afforded to you an opportunity to air your side of the current complaint, and your remedies to satisfy that complaint.... ". Mr. Weller had never actually attended the Union meeting but said that he "could tell by the response I got from the Vice-President, that his views were basically the same as everybody else's view. If I approached them, I felt I would have got nowhere".

Evidence concerning the Sabbath requirements for members and adherents to the Worldwide Church of God was given by Pastor Gary King. He obtained a Bachelor of Arts degree from Ambassador College, a four-year liberal arts college owned and administered by the Worldwide Church of God, in 1976. He did a further post-graduate year at Ambassador College in preparation for ministry with the Worldwide Church of God. He proceeded to ordination and ultimately was assigned pastor of the Hamilton and St. Catharines Worldwide Church of God churches in August 1985. He is qualified as a expert in the Worldwide Church of God and its teachings.

Pastor King described the Sabbath requirements of the Worldwide Church of God as abstaining from normal work and occupational duties that one would pursue during the rest of the week. Adherents are expected, if possible, to assemble with others in church on the Sabbath and the focus of the day is to get away from the duties that one can perform on the other six days of the week. Time is to be devoted to extra bible study and to spending quiet time with family members and other church members. The only exception to the general requirement that an adherent not work on the Sabbath is an emergency. Pastor King gave the example of having one's car go into a ditch so that one needed to haul it out. Pastor King described adherence to the Sabbath as "an extremely key and central doctrine of the church".

If a prospective member did not comply with the Sabbath requirements, Pastor King confirmed that such a person could not be admitted into membership. Anyone who was already a member who breached the Sabbath and who refused

to desist from doing so after counselling, would cease to become a member. Furthermore, according to the doctrines of the Worldwide Church of God, a member who failed to comply with the Sabbath would not receive eternal life after death and would not have the opportunity to repent in the afterlife and be absolved of breaching the Sabbath. Someone who is not a member and who has not accepted the teachings of the Church would, according to the beliefs of the Worldwide Church of God, have some opportunity to repent in the afterlife.

Pastor King clarified the church's expectation of members concerning the Feast of Tabernacles. This Feast occurs within a week after the Day of Atonement and lasts seven days with a Holy Day, called the Last Great Day following immediately thereafter. Church members are absolutely prohibited from working on the first day of the Feast of Tabernacles and on the Last Great Day, eight days later. However, for the days in between, they are also expected to attend a Feast Site for the entire period with their families. On these days, two hour morning services are held and then there are a number of other organized activities to promote togetherness among church members and among families. The Worldwide Church of God does not observe Easter or Christmas.

The complainants' work schedules were described to Pastor King and he was asked whether, in those circumstances, the complainants would be allowed to work after sunset on the Friday shifts. Pastor King confirmed that it would not be consistent with the beliefs of the Worldwide Church of God for them to do so and if it came to his attention that members were working on the Friday evening shifts, he would initially attempt to help them solve the problem but ultimately would have to advise them that their membership would be terminated if they continued to do so. Pastor King also stated that it was not a contravention of church doctrine for the complainants to arrange for other workers to work their shifts on Friday nights and even to pay incentive money to those who replaced them.

According to Pastor King, a person becomes a full member of the church upon being baptized and baptism depends on the person demonstrating willing adherence to the teaching and doctrines of the Church. Pastor King testified that this

demonstration of adherence took time and, while that time could vary from individual to individual, in some cases it could take years. He agreed that during that period of time leading to baptism, an individual could nonetheless be a sincere believer in the Church and in the Sabbath requirements. It is frequently the case that prospective members of the Church, being those who are actively interested in becoming full members but who have not yet been baptized, described themselves commonly as members.

Pastor King is well acquainted with Mr. Roosma who attends his church faithfully. Pastor King actually baptized Mr. Roosma and believes him to be a sincere and faithful adherent to the Worldwide Church of God and its doctrines. He has also observed Mr. Weller, who is a member of the congregation in St. Catharines, but who visits the Hamilton church every six weeks or so on average. On the occasions that he has seen Mr. Weller, Pastor King has observed him as participating in the service.

In cross-examination, Pastor King was asked whether he or the Worldwide Church of God would consider it an emergency if a person was facing financial disaster as a result of adherence to the beliefs of the church. Pastor King was forthright in responding that even such a financial crisis would not, under the church's doctrine, be a reason for working the Sabbath. When asked if that meant in effect that members were required to "martyr themselves", Pastor King emphasized that the teachings of the Worldwide Church of God and the individuals coming to believe are "prior to baptism" and the emphasize the right of each person to determine whether to join as a matter of free will. However, Pastor King agreed with counsel for the Union's suggestion that in the face of a conflict with Sabbath observance, a member "must make the choice between security, well-paid employment and membership in the Church".

At this point in the proceedings, the Ontario Human Rights Commission concluded its case-in-chief. Counsel for the Union then reserved on the record a right to argue that the complaints do not disclose allegations that are capable in law of implicating the Union as having constructively discriminated within the meaning of section 10 of the Code.

Furthermore, counsel for the Union further reserved the right to argue that he Commission had failed to establish a prima facie case that the Union participated in any act or omission which in law or under the Code could constitute constructive discrimination. Finally, the Union also reserved the right to argue that there was and is no duty of accommodation on the Union concerning the religious needs of the complainants.

Mr. Ted Stawikowski was the first witness called by the respondent Company. He entered the Ford Motor Company's employ in August 1976 as an accountant in the comptroller's office. He moved into a cost analyst position before being laid off indefinitely in July 1980. He then returned to McMaster University and completed the fourth year of a commerce degree. At that point, in the fall of 1981, he accepted an offer to return to the Ford Motor Company Oakville Assembly Plant in the labour relations department. In this capacity, he dealt with senior Union officials and eventually became the labour relations co-ordinator with the other four labour representatives reporting to him. He in turn reported to the supervisor of labour relations. He then became the supervisor of plant security which meant that he was in charge of the safety program for the Oakville Assembly Plant and was also in charge of the security department for both the Oakville Assembly Plant and the Ontario Truck Plant next door. At the time of testifying Mr. Stawikowski was supervisor of salary to personnel and training, a position whose duties include recruitment and classification of salaried personnel, dealing with salaried personnel problems, complaints and absenteeism and establishing training programs.

Mr. Stawikowski facilitated this Board's "taking a view" of the Oakville Ford Assembly Plant by conducting a tour of the Plant with all parties in attendance on May 29, 1989. The tour began in the body shop which marks the beginning of the body build process. Parts are delivered to the body shop by materials handling personnel either directly from railway cars or from fork trucks that remove stock from the railway cars and bring it to the assembly line. The stock in the body shop is unpainted metal that has come from one of Ford's stamping plants and the parts are there welded to together to make the basic body of the vehicle. Many of the parts are initially welded and then hung on a

conveyor line and all lines meet a point where the car can be seen to come together as the bottom of the car meets the sides and the roof.

At the point the frame of the car has been welded together, the car is being transported on to skids which resemble two long metal skis. These skids are attached to the car with skid bolts and these hold the car right through plant as it is painted and trimmed until the bolts are removed by a robot and the car is hoisted on to the clam shell.

As the car bodies proceed through the body shop, those that have to be repaired are put aside while the others are transferred to the next department by an elevator. The repairs are made by skilled workers who are called metal finishers and whose job requires considerable finesse. It is important to have these repairs made before the vehicle goes to the paint shop because it is much more expensive to repair a car after it has been painted.

Once the car body leaves the body shop, it travels up an elevator to what is called the "E" coat. We did not actually see this part of the assembly line on our tour but Mr. Stawikowski described it as a washing of the vehicle followed by the application of rust inhibitor through taking the body through an electrically charged dip tank. The car then comes down from the "E" coat area to the sealer deck where sealant is applied to all the welded joints of the car to prevent water leaks. There is also material applied to deaden sound and ensure that the vehicle rides quietly. This is a continuous process with each worker having allocated task to be completed in an allocated amount of time as the car moves along the assembly line from station to station. If one of the workers is having difficulty completing the job, the leader or leadhand is called. If the leadhand is unable to assist in completing the job, the line will be shut down. However, the shutting down of the line is something to be avoided and would only occur in the case of a major repair.

Throughout the Oakville Ford Assembly Plant, there are several control points where inspectors examine the vehicles as they pass by. If a certain number of the same type of problem occurs, a red light is activated over the assembly area and this indicates that the area is "out of control". This area immediately becomes one of top priority as the problem is identified and addition workers are brought in to correct it as necessary. Occasionally the entire line will have be shut down.

The vehicle next proceeds from the sealer deck to the prime booth and after the primer coat is applied it goes through the sanding area. This sanding and preparatory cleaning of the vehicle is particularly important at the Oakville Ford Assembly Plant because other plants, such as the sister plant in Kansas City, have an automated base coat/clear coat paint operation. In the Kansas City Plant for example, the first coat of paint is enamel followed by four coats of clear lacquer. At the Oakville Plant, all painting is done manually with four coats of enamel and this is harder to apply. According to Mr. Stawikowski, customers prefer the base coat/clear coat paint finish and dealers have indicated that this is a marked customer preference. The Kansas City Plant, like the Oakville Plant, produces the Tempo and Topaz models. Mr. Stawikowski understands that the cost of installing a base coat/clear coat paint facility at the Oakville Plant who be approximately $45 million.

Once the vehicle comes out of the paint shop it goes up to the mezzanine where it is scheduled and then back down to the trim shop. The first operation of the trim shop are the loom and wiring operations. These are extremely important because if they are performed incorrectly some components that are added subsequently, such as carpeting and door panels, will have to be ripped out to get to them. Each car goes through all four trim lines and each operation performed on those trim lines is dependent on that which preceded it. When a car reaches the end of one line it crosses over and goes immediately into the next line. The last trim line, where the moulding is installed, is the "catchall" line. An attempt is made to catch any repairs prior to the car going to the chassis department.

If repairs are not caught before the vehicle goes into the chassis department, the vehicle is pulled aside and an attempt is made to repair it and put it back in the chassis line before it is out of sequence. Sequence is particularly important because different operations have to be performed on different vehicles depending on it features. As the vehicles move along, the right motor and right seats, for example, have to be ready to be installed in them.

As the vehicles move through the chassis department , they are still on skids in what is called the "high line area". Once the operations, such as installation of struts and bumpers, are finished on the high line, the vehicle goes to the robot that removes the skid bolts and a "clam shell" picks up the vehicle which is then directed to the north end of the chassis department. Here most of the underbody work is done including the installation of brakelines and pads and the engine compartment is prepared for installation of the engine. The gas tank is installed just prior to the vehicle reaching what is called the "moon buggy". The "moon buggy" carries engines around in a circle and these are hoist up into the vehicles as they approach. Synchronizing the arrival of the vehicle with the corresponding engine is critical. The engine mounts are then secured as the vehicle comes down to the main chassis line to have various hoses, pumps and pulleys connected in order to make the motor operational. The wheels are put on, the final connections are made, the seats are put in and then at the end of the chassis line, the car is started. If the vehicle will not start, it has to be pushed off the line because another vehicle is right behind it. The cars then go through a series of tests and inspections and if there is still something wrong, the vehicles are sent to the hoist to be repaired. If too many vehicles end up at the hoist, the main chassis line has to be shut down.

Mr. Stawikowski was asked how the Oakville Assembly Plant compared with other plants. It was built in 1953 and is one of Ford's oldest assembly plants. Most other plants are more extensively automated and, at that time, in June 1989, there was still no product line scheduled for the Oakville Assembly Plant for 1990.

Total wages, salaries and fringe benefits for 1987 were $132,900,000 at the Oakville Assembly Plant. Because wages still have to be paid when the line stops, the Company is particularly concerned to keep it going. If the plant is operating a full capacity with two ten hour shifts Monday through Thursday and two eight hour shifts on Friday, then a certain amount of production cash flow is lost every time the line stops because the production cannot be made up elsewhere. The line speed is set at 65 cars per hour or slightly more than one per minute.

Mr. Stawikowski referred to the Ford Motor Company's increasing emphasis on quality. This is reflected in the Company's statement of guiding principles:

GUIDING PRINCIPLES

- **Quality come first** - To achieve customer satisfaction, the quality of our products and services must be our number one priority.
- **Customers are the focus of everything we do** - Our work must be done with our customers in mind, providing better products and services than our competition.
- **Continuous Improvement is essential to our success** - We must strive for excellence in everything we do: in our products, in their safety and value - and in our services, our human relations, our competitiveness, and our profitability.
- **Employee involvement is our way of life** - We are a team. We must treat each other with trust and respect.
- **Dealers and suppliers are our partners** - The Company must maintain mutually beneficial relationships with dealers, suppliers, and our other business associates.
- **Integrity is never compromised** - The conduct of our Company worldwide must be pursued in a manner that is socially responsible and commands respect for its integrity and for its positive contributions to society. Our doors are open to men and women alike without discrimination and without regard to ethnic origin or personal beliefs.

Ford's own surveys indicate that since 1980, its quality customer rating has improved by 31% and owner loyalty has improved by 10%. The Company also emphasizes its progress in improving cost competitiveness. Its records indicate that in North America, Ford's 1986 profits before taxes were $1,180 a unit which was more than double General Motors unit profit and almost $200 per unit better than Chrysler's. Mr. Stawikowski also noted that Ford executives are concerned that General Motors and Chrysler are catching up in quality ratings and that Ford is particularly concerned not to lose its competitive position as the number one domestic auto maker in quality ratings over the last eight years. Mr Stawikowski was also asked to describe the role of the collective agreement in determining a plant employee's rights and manner of

treatment by the Company employer. Mr. Stawikowski stated that everything to do with wages, vacations, seniority rights and manpower movement as well as management rights were governed by the collective agreement. The first example of manpower movement given by Mr. Stawikowski was job advertisements. These are of two types: departmental job advertisements and plant-wide job advertisements. For departmental job advertisements, employees bid on the job and are selected based on their seniority and ability to perform the job tasks. Only the people in the particular department may bid on the departmental job ads. If no successful applicants are found for a particular departmental job advertisement from that department, then the advertisement goes plant-wide and employees throughout the bargaining unit including the truck plant (which is in the same bargaining unit) are given the opportunity to bid. Once a person bids on a departmental job, the collective agreement prohibits the person from bidding again for a three-month period unless such bid relates to a higher paying job. With respect to plant-wide job advertisements, the prohibition period is six months.

The Oakville Assembly Plant also operates on what is called a "better job equal pay" basis. This allows an employee to bid on a job in his classification which that employee perceives as a better job even if it is at equal pay. Such employees advise their supervisor or Union steward that they are interested in that job and they are selected on the basis of seniority.

Vacation is also determined by seniority so that vacation time is allotted according to the number of years an employee has with the Company. To some extent, wages are also subject to seniority. This is because newly hired employees are paid at 85% of the full wage rate and this moves to 90% after six months, 95% after six more months and then, after eighteen months, to the full wage rate.

Leaves of absence are also granted on the basis of seniority as are recall rights and layoffs.

In Mr. Stawikowski's view, seniority is very important to the plant's hourly workers. When he was the senior co-ordinator in labour relations, he held weekly agenda meetings with the Union and recalls that seniority was invariably discussed in one form or another. He recalls that when students were brought in for the summer, for example, the Union was adamant that they should not be put in quality control, materials handling or plant services because the senior employees should have been given an opportunity to go to those departments.

Only in the case of a major disability, can a junior employee bump another more senior employee and that can only happen so long as the senior employee is not bumped entirely. Clause C of section 15.29 of the collective agreement between the two parties stipulates that "notwithstanding the forgoing provisions of this section 15.29, any employee who has been incapacitated in his regular work, by injury or compensable occupational disease, while employed by the Company, may be employed in other work in the plants at Oakville which he can do by mutual agreement between the Company and the Union without regard to any seniority provisions of this agreement". There is no equivalent clause in the collective agreement for exceptions to seniority for considerations of religion or creed.

Mr. Stawikowski testified as to a number of programs instituted by the Ford Motor Company to ensure that high quality standards are maintained. These are supported by extensive training programs which may involve in-plant training but may also require personnel to go to Detroit to be trained.

Employee benefits are determined under the collective agreement. The Ford Motor Company calculates the cost of one hour of direct labour in 1989 as approximately $27.03 which includes approximately $15.80 in direct wages, fixed fringe benefits costing $7.28 an hour and variable fringe benefits costing approximately $3.95 an hour. The fixed fringe benefits consist of costs that the employer has to pay even when an employee is not at work such as medical and dental benefits and insurance premiums. The variable fringe benefits include the cost of living allowance as well as the shift premium and workers' compensation costs. Employees on lay off have these benefits covered and also receive

supplemental unemployment benefits (SUB). The provision of these benefits varies according to seniority so that an employee with ten years seniority might collect 70% of wages where as an employee with only three years might only collect 30%.

Extensive evidence was presented concerning the budget and manpower authorizations received by the Oakville Assembly Plant from Detroit headquarters. A yearly "task" is issued annually to each assembly plant and this typically involves working more effieciently to reduce operating costs. Each week, the Oakville Plant is required to report to Detroit exactly how many people were working in particular divisions of the plant and this performance is measured against authorized manpower budget that had been given to the Oakville Plant. Records are produced on a continuous basis for every shift.

At the end of the 1986 model year, the Oakville Plant was considered to be uncompetitive with its sister plant in Kansas City with respect to "plant cost performance". This led to a mutual committment by the managment and Union of the Oakville Plant to increase its cost competitiveness particularly against the Kansas City Plant.

The role played by certain skilled workers was also described by Mr. Stawikowski. Leaders are in a superior job classification and are paid a premium because they must know every operation. Furthermore, leaders may be called upon to work in another zone, rather than their designated area, and be capable of performing several operations in that other zone.

The relief man's function is vital to allowing the assembly line to continue running because he relieves the operators in his area in succession while they take the breaks allowed to them under the collective agreement. When a worker is absent from a critical job, the relief man maybe be put exclusively on that job to ensure that the line keeps running. This creates difficulties because the operators are frequently upset if they lose their break. Sometimes this

requires the relief function to be taken over by the leader or even by the absentee allowance. The absentee allowance is specifically designated to perform the job of an employee who is absent on a particular day. Sometimes one employee may "bump" another because of manpower rebalancing, quality additions or medical placements. Article 30 of the collective agreement gives the Company 120 days from the launch of the new model to achieve improvements in productivity through rebalancing work and assigning additional work. The Company's industrial engineers spend time of the plant floor doing time and work load studies. As a result of those, they may determine that an employee's work load is too light and assign additional tasks. This may lead to the elimination of employees and those employees then go to their previous classification if there are no openings in their current classification. Those employees will then bump the junior employees in that previous classification and will stay in those jobs until they are able to bid on other jobs within their seniority.

The Ford Motor Company identifies absenteeism under several different headings. These include being absent without leave, being absent while on Workers' Compensation, being absent due to an accident or illness, being absent for personal reasons or as a result of disciplinary action or to serve on a jury. There is also a provision in the collective agreement for three days' paid absence for bereavement and leaves of absence and vacation are also catagorized as absenteeism. Reporting of absenteeism is first made through the supervisor to the general foreman. When the employee returns, the general foreman is required to ask the employee to give a reason for the absence and has the discretion whether to accept the reason or not. If the general foreman does not accept the reason for the absence then the absence is unauthorized and noted on the attendance record as such. The attendance records are monitored by the Labour Relations Department and absentee and lateness interviews are held as required.

Some documentary evidence was tendered indicating that the Company has significant concerns about the level of absenteeism and its effect on employee morale and the efficiency and quality of work at the Oakville Assembly Plant. A memo was posted to all hourly employees at the plant, dated November 27, 1987, stating that "it is recognized that

a small number of employees are absent a vastly disproportionate number of days" and indicating that the absentee record of the Oakville Assembly Plant relevant to other plants had deteriorated since 1980. I also allowed a number of documents into evidence that had been prepared by the Company for negotiations with the Union. These showed historical patterns of absence at the Oakville Assembly Plant as well as the type of absentee discipline imposed in certain years immediately preceeding this hearing. These documents indicate patterns of absenteeism with absenteeism being higher on Fridays and especially during Friday nights. On a monthly basis, there are more absentees during the summer months with more accident and sickness claims being made from June through to August. Absences on Workers' Compensation also appear to be higher during the summer months.

For example, on October 31, 1988, which was a Friday night, 156 people were absent which was the highest rate of absenteeism for the month of October for the evening shift. Mr. Stawikowski suggested that this was due to it being Hallowe'en night and that "most of the fathers stayed home for that evening with their families". In 1988, Ford's records indicate that the Canadian absentee rate was 10.9% whereas plants in the United States had an absentee rate of only 6.2%.

In 1984, the Union requested that paycheques for those on the Friday day shift be released on the Thursday day shift so that employees would have opportunity to do their banking either on Thursday or Friday. This policy was adopted by the Company; however, its evidence indicates that this resulted in the absenteeism rate on Fridays increasing substantially.

The Company's primary method of dealing with absenteeism is through the absentee allowance position. Each zone in the plant has a number of absentee allowances designated to it and these individuals may have to know 20 to 30 different jobs. The complainants worked in zone C in the north end of the chassis department and there were two absentee allowances assigned to this zone. Sometimes, if more than two people were absent from zone C, a spare

absentee allowance from another zone might be brought in. Alternatively, where there was a concern about absenteeism on the afternoon shift, employees might be asked to double-back from the day shift although this involved paying them at time and a half for the additional eight hour shift. There was also a concern about the effects of fatigue on a worker who works two straight shifts.

On April 11, 1977, a notice was posted at the Oakville Assembly Plant directed to all hourly employees. As of that date, the Company instituted a policy under which an employee could ask for a day off in advance. In the case of the number two shift, absence could be authorized on Tuesday, Wednesday, Thursday or Friday; however, for the number three or evening shift, absence would only be authorized for Tuesday, Wednesdays, or Thursdays. Authorization was not automatic. An employee was required to ask the supervisor and give reasons and, based on the assessment of requirements for the day requested, the request would either be granted or not. According to Mr. Stawikowski, Friday night was excluded because absenteeism was highest on Friday nights and the Company did not feel that it could give excused time off because it had "enough trouble running along with everybody that decides to come in to work as opposed to initiating additional time off work".

Copies of the daily manpower reports of the Oakville Assembly Plant for January 1985 to December 1987 were also introduced through Mr. Stawikowski. These documents were relevant to the issue of "churning" which refers to the movement of employees throughout the plant on a particular shift due to such factors as absenteeism and medical placements. In the Company's view, churning was a major concern because it hurts quality and adds incremental costs because of the additional repairs or stoppage of the line that occurs when inexperienced operators are working at particular jobs. Indeed, all assembly plants, including the Oakville Plant, were asked by the Detroit Regional Manager to prepare a paper on the effects of churning. That paper identified for example the number of estimated learning days that resulted from employees moving to a different job under the "better job/equal pay" provision. The Company's concern is that there

is reduction in productivity when workers have to spend time learning jobs and there is also evidence that the repairs required vary proportionally with the amount of churning.

Forty per cent of the work force at the Oakville Assembly Plant are entitled to the maximum vacation which is 220 hours or five and a half weeks. The summer shutdown is three weeks in length and everyone must take that period as vacation except those who are required to work to maintain the plant or make improvements. For those who have more than three weeks vacation, the remaining vacation time is chosen according to seniority. During the holiday period, there is a higher than average level of absenteeism and student replacements are brought in to perform the jobs of vacationing employees on the line. Again, Ford's own documents indicate that more repairs are required on vehicles which are assembled during these peak holiday periods.

Mr. Stawikowski was a Labour Relations Representative assigned to the B shift. This is the shift that the complainants were on and he moved with them when the shift went from afternoons to nights. He was at Ford in 1984 when the complainants were on the gas tank install and secure jobs.

The gas tank operation, according to Canadian Motor Vehicle Safety Standards, is a critical operation which means that there are significant safety implications. There are also other consequences of the gas tank install and secure jobs not being performed correctly. The most obvious of these is where the car does not start at the end of the line. The major reason for such malfunction would be improper hooking up of the sender unit to the gas tank. If the sender unit has not been properly installed, the vehicle must be put up on the repair hoist, straps must be taken off the gas tank so that it can be lowered and the sender unit reseated or replaced. This is not a repair that can be made at one of the repairs stations because of the positioning of the unit underneath the body of the car. There are also potential problems with vibration and with failure of the fuel lines due to improper positioning.

Mr. Stawikowski also testified about his initial meeting with the complainants regarding their need for Friday nights off. His initial response to the complainants was that he did not think they could be accommodated because of the Friday night absentee problems at Ford but that he would investigate the possibility with his supervisors. He went to his immediate supervisor, Sean Melnyk, and Mr. Melnyk took the matter up with the industrial relations manager, Mark Bialkowski. The message that came back, and which Mr. Stawikowski delivered to the complainants, was that they could not have Friday nights off because of the Friday night absenteeism problem.

Mr. Roosma's timecards covering several pay periods from October through December 1994 were tendered in evidence as where several of Mr. Weller's timecards for the same period. These cards indicate, according to the punchout times, that both Mr. Weller and Mr. Roosma had worked Friday evenings into November 1984 and, in Mr. Weller's case, two timecards from January 1985 indicate that he worked through the Friday night shift. This evidence was backed up by the Company payroll fiches which indicated the hours worked by the complainants in particular weeks. Mr. Stawikowski testified that he began to take written notes of the complainants' Friday night absences but that these did not regularly occur until January 1985. Specifically, Mr. Stawikowski believes that Friday, January 25, 1985, was the first Friday night the complainants missed. On that evening their absence was covered by two people who double-backed from the earlier A shift for part of the Friday night evening shift and then these double-backs were replaced by an absentee allowance and another double-back. The day shift double-backs were paid at time and a half for the hours they worked on the Friday evening shift. On that evening, the Company records disclosed that there were eighteen people absent in area 1, which is ten above the budgeted absentee forecast of eight. On the next Friday evening shift, February 1, 1985, the gas tank secure operation was covered by the absentee allowance, Mr. Smorong, and the gas tank install job was covered by two A shift double-backs. Both these double-backs would have been paid time and a half for the full evening shift. The complainants worked the day shift for the next two Fridays and when they resumed the evening shift, they arranged to double-back themselves, as previously described, by switching with Anthony and Shaw.

The strain felt by the complainants in doubling-back on the Friday day shift after working Thursday night has already been described above. Consequently, they did not continue with that arrangement the following week and, again, one of the jobs was covered by the absentee allowance and the other job was covered by two double-backs. The two double-backs had no training and therefore, the leader and the relief man were tied up for some time at the beginning of the shift in order to train the two double-backs in the job. The Company's records indicate that on that evening, there were 11 absences in the area, including the two complainants, and three workers had to be borrowed from the A shift as double-backs. None of the absences had been authorized in advanced. This situation can be contrasted with that prevailing on April 19, 1985, when the complainants were also absent. On that evening they were the only two workers absent from the zone and so the two zone absentee allowances, Yates and Smorong, covered their jobs. Consequently, on this evening, there was no incremental cost to the Company.

Considerable evidence was tendered concerning the details of covering the complainants' absences on Friday nights. Particular difficulties were experienced on a Friday night in mid-August when the complainants were replaced by two students on the gas tank jobs. A large number of repairs to gas tanks were required to the point where cars were lined up at the repair hoist and the hoist repairman had to stay an additional four hours. Mr. Stawikowski indicated that a typical gas tank repair job would take 45 minutes including the time required to pull the car off the end of the line, put it up on the hoist, releasing and lowering the gas tank, removing fuel as necessary, doing the repair and then reversing the process to put the car back at the end of the assembly line.

There was also considerable evidence concerning the leaves of absence granted to the complainants so that they could observe religious holidays. The evidence indicates that the Company carefully considered how the complainants' jobs would be covered during leaves of absence and the records indicate that there were certain inconveniences in granting them because of manpower problems created by absenteeism and other types of leaves such as medical leave.

Mr. Stawikowski indicated that Mr Roosma had never explained to him in detail the formal requirements of observing the days considered holy by the Worldwide Church of God. He stated that he was not aware until this hearing of the difference between high holy days and other festival days. In June 1986, Mr. Stawikowski was promoted to Labour Relations Supervisor and so no longer matched the B shift in his working hours. That responsibility was taken over by Mr. Katchinowsky. In March 1987, Mr. Stawikowski became supervisor of Safety and Security which took him out of the Labour Relations department all together.

There are two ways of obtaining a new job at the Ford Motor Company. The first arises under the "better job, equal pay" system. This occurs when an employee becomes aware of an open job in the same classification as the employee's existing job. If the employee wishes to move to that other job, the employee simply advises the Union or the supervisor. The Company does not normally solicit applications because, according to Mr. Stawikowski, of the churning effect. The Company simply establishes a deadline for filling the job and picks the most senior of the employees who have expressed interest.

The second way of obtaining a new job at Ford is through posted job advertisements. Employees are required to apply specifically for those jobs by submitting a signed card or application to the Labour Relations department. Labour Relations personnel compile a list based on classification and seniority and taking into account the last time that the particular individual bid on a job. Within those boundaries, and in accordance with the collective agreement, the senior employee who is willing and able to perform the job is then chosen for it. The amount of seniority required to obtain a job at a particular classification varies with the particular job. For example, Mr. Stawikowski testified that the seniority of those working in the labour gang would be from 30-35 years of service. In his view, it would have been a breach of the collective agreement to ignore seniority and simply transfer the complainants to the labour gang.

Officials at the Oakville Assembly Plant were concerned about alerting the hourly workers to the concerns over production costs at the plant. On November 7, 1986, the Company decided to stop the production line on both shifts and discuss these concerns with the workers. Each supervisor met with the workers in his zone and went over with them the list of concerns set out in a document entitled "Oakville Plant Cost Position for 1986". That document disclosed that the Oakville Plant was $8,300,000 or 7% over the cost budget established for it by headquarters at Detroit. Three million dollars of that total resulted from production loses and the three major reasons identified for production loss include absenteeism, facility breakdown and holding the line for quality.

A particular cause of the concern of management over absenteeism at the Oakville Plant is the deterioration in its record. Starting in the early 1980s, the plant's reasonably good record on absenteeism has deteriorated relative to other plants. The two biggest causes of absenteeism at the Oakville Plant have been medical problems and workers simply being absent without any legitimate reason.

In cross-examination by the Ontario Human Rights Commission, Mr. Stawikowski estimated that he had several meetings, somewhere between eight and ten, with Mr. Bialkowski and Mr. Melnyk to discuss possible accommodations of the complainants. He recalls discussing possibilities of swapping shifts, working straight days versus straight afternoons, the labour gang, working Sundays and the prospect of the complainants paying the Company the half time differential so that other employees might take their jobs. Mr. Stawikowski recalls that such meetings occurred until he left the Labour Relations Department but he did not keep any of the notes of any of the meetings. Mr. Stawikowski himself met with Davey Hall on certain questions arising out of the complainants' requests and he is aware that Mr. Melnyk met with the Union committeeman, Don Ferguson, on a number of occassions concerning the complainants' requests for leaves of absence. However, he is not aware whether other management personnel above him in the plant hierarchy met with respresentatives of the Union to consider the matter of accommodation.

At the St. Thomas Ford Assembly Plant a program was developed through negotiations between plant management and the Union. The S.T.O.P., or "Scheduled Time Off Program", involved, among other things, having students take the place of absent employees on Friday nights. Mr. Stawikowski said that he became aware of this program through reading the Union newspaper from the St. Thomas Plant, but had not discussed the program with officials at the St. Thomas Plant. He was also unaware of whether anyone else at the Oakville Plant had made enquiries about the St. Thomas S.T.O.P. program. The St. Thomas Plant is also an automobile assembly plant which produces the Crown Victoria and Grand Marquis models. Like the Oakville Plant, the St. Thomas Plant works on two shifts and both plants are subject to the master agreement between the Union and the Company with certain sections applying to both plants. Each plant also has its own local agreement.

Mr Stawikowski is not aware of any memoranda prepared by Oakville Plant management on the question of accommodating the complainants. He did not personally deal with any requests by any other employee to avoid working on Friday nights for religious reasons during the period from 1984 to 1988. He believes, however, that a woman in the paint shop may have made a similar request but such request was not accommodated and she found alternative employment.

Counsel for the Commission questioned Mr. Stawikowski closely on his views of the sincerity of the complainants' religious beliefs. Mr Stawikowski was forthright in agreeing that he did not doubt the sincerity of the complainants' religious beliefs or of their requests for Friday nights off so that they could observe their Sabbath. However, he was equally forthright in stating that he could recall the complainants working some Friday nights after they had made their request and up until the New Year 1985. He could not identify any particular dates when he observed the complainants working after sundown on any Friday following a request for accommodation. Mr. Stawikowski agreed that the Ford Motor Company has been very profitable from 1983 until the downturn in business in 1988. He attributes this to co-operation between management and workers to concentrate on improving quality and controlling costs.

Other than the fact-finding session conducted by the Ontario Human Rights Commission, Mr. Stawikowski has no recollection of ever meeting with the complainants to discuss possible accommodation of their religious needs. He also did not ever meet with his superiors together -- Melnyk, Bialkowski, McLean and Wiley -- in order to discuss the complainants' requests.

Regular meetings, usually on a weekly basis, are held between the Union negotiating committee, made up of the Committeeman and the Plant Chairman, and the Industrial Relations Managers and Labour Relations Co-ordinators for the Oakville Car Plant and the adjoining Ontario Truck Plant. The question of accommodating the complainants' requests could have been raised by the Company or the Union at these agenda meetings; however, Mr. Stawikowski reviewed all the minutes of those meetings and found only one direct reference to the complainants' situation. Mr. Stawikowski is not aware of any other Company memoranda referring to meetings between management and the Union at which the complainants' requests were considered.

Workers who are elected to senior Union positions are able to work straight days. This may mean that someone elected to such a position would be entitled to a straight day job even though such entitlement would not have come to them based on seniority. However, such Union representatives are otherwise governed by the seniority provisions of the collective agreement, for example, when it comes to bidding on other advertised jobs.

In cross-examination, Mr. Stawikowski emphasized that it would be virtually impossible for the Ford Motor Company to calculate the cost per absence of the complainants from a Friday night shift. On each Friday night, it would be a matter of speculation as to which "bumpings" from job to job would be required to enable their jobs to the covered. Mr. Stawikowski acknowledged that this very difficulty of anticipating the circumstances that would prevail on any Friday night also makes it likely that the cost to Ford of an unauthorized absence would be virtually identical to that of an authorized absence. Thus, while in theory the advance knowledge that one worker in a twenty person zone was to be

absent should enable that absent worker's job to be covered by using the absentee allowance within the zone, it would usually be the case that others would be absent as well. The jobs of those other absent workers would then have to be covered by doubling up, getting double-backs from the other shift, transferring people from other departments or zones within the department or even, in extreme situations, going to mass relief. Mr. Stawikowski was also of the opinion that the cost to Ford of an absence on a Friday afternoon shift would be greater than any other shift during the week because the incidence of absenteeism, both unauthorized and authorized, is highest on Friday afternoons or nights.

Mr. Stawikowski was asked for his view of how best to cover one person's absence. In order he identified first, covering the job with the absentee allowance; second, using an operator on the same shift; third, covering the job with the lead hand; fourth, doubling up on the job and, as a last resort, shutting down the chassis line. In his view, this is the hierarchy of measures to be taken in order to limit the costs and the disruption to the workforce while maintaining the quality of the product.

Reference was made in Mr. Stawikowski's testimony to notes prepared by Mr. Bialkowski to the effect that when the complainants were on their jobs virtually no repairs were required but that when they were absent the repairs generated from their positions by replacement workers averaged 10 to 30. Each of these repairs would be estimated to take three quarters of an hour but Mr. Stawikowski could not point to any study that had been done to justify the estimated range of repairs. He did agree that when the two absentee allowances, Smorong and Yates, were replacing the complainants on the job, the fewest possible repairs would result. A good deal of time on cross-examination was devoted to having Mr. Stawikowski calculate the increased wage costs to Ford in covering for the complainants on specific Friday nights for which specific data are available concerning how their jobs were actually covered. There was also an attempt to attribute repair costs, based on the belief that those replacing the complainants would on average generate 20 repairs per shift, for Friday evenings where sufficient data were available. Mr. Stawikowski, in giving evidence on these likely costs, attributed no repairs to the gas tank operations when the complainants were present, and attributed an average

of 20 repairs per shift when they were both absent and 10 repairs per shift when only one was absent. So, for example, in September 1985 the cost of 20 repairs to the complainants' operations when they were both absent on a Friday evening was attributed by Mr. Stawikowski as $313.05: this is calculated by using the average labour rate in 1985 of $20.87 and multiplying it by the fifteen hours of total repair time assuming that each repair takes 45 minutes.

A good deal of evidence was heard in cross-examination of Mr Stawikowski concerning his view of the costs to Ford of covering for the complainants when they were absent without leave in order to observe the Sabbath on Friday evenings. Relying on notes made by Mr. Stawikowski as to how those absences were covered, dollar values were attributed to the increased cost of covering for the complainants' unauthorized absences. However, Mr. Stawikowski was not able in every case to identify precisely how the complainants' positions had been covered and also emphasized that certain "costs", such as the effect on employee moral, could not be quantified.

Time was also spent examining the "W Books" . These set out the direct labour standard per base vehicle, which is to say a vehicle with no options, together with the direct labour time standard for all options. These are produced annually. These standards are set by Ford Headquarters in Detroit and are not generated at the Oakville Plant. However, they are specific to the Oakville Plant in that they prescribe the budget for time and labour to build a particular vehicle. So, for example, precise standards are established for building a four-door Ford Tempo with 2.79 hours allotted to body shop operations, 1.75 hours allotted to the paint shop, 3.2 hours in trim, and 2.79 hours in chassis to a total of 10.3 hours. The plant then takes the number of units that they are to build in a partcular day and mutliplies that figure by the number of hours allowed to assemble each vehicle and that yields the standard total number of hours. Detroit Headquarters may then impose a further efficiency requirement on the Oakville Plant in arriving at a final budget hours figure.

A good deal of documentary evidence was also tendered concerning absenteeism and its various causes and manifestations at the Oakville Plant and as compared with other plants in Canada and the United States. Many of these were for the years 1984 through 1988. This point about the volume of evidence tendered is perhaps illustrated in the title of exhibit 137: "File Folder Containing Bundle of Budget and Variance Reports for the Years 1984 to 1988 inclusive". The Commission requested these documents from Mr. Stawikowski in cross-examining him and, a further request was made for a copy of each daily direct labour report for the Fridays from 1985 through 1988. The respondents objected strenuously that they could not see the relevance of such documents.

I note that the Commission took the view, in light of my decision, described above, that the respondent Ford would not be required to respond to a subpeona seeking broad production of documents, that it would have to seek production of the documents which it felt to be relevant on a document by document basis. The Commission took the view that this documentation was necessary to enable it to refute Ford's position concerning undue hardship and I regularily found myself in a position, when called upon to rule, of not knowing whether the document was clearly relevant or not. In light of the other statistical information entered by the respondent Ford through Mr. Stawikowski in-chief, I gave fairly broad latitude to the Commission and admitted documents unless I was convinced that they were not relevant or were not likely to be relevant. My view was that I would be in a better position at the end of the day to decide the relevance and weight to be given to a volume of statistical information placed before me.

The respondents objected that this hearing had become an examination for discovery and that the Commission was seeking documentary evidence that was not only exhaustive but repetitious. The most considerable concern expressed by the respondents was about preserving the integrity of the process, a matter that I will return to later. At the time, in July 1990, I expressed on the record my view that a large part of the reason for these concerns being expressed was the inadequacy of the Ontario Human Rights Code in failing to make "adequate provision for the question of how documents are provided". I further noted that when I first met by conference call with the parties to establish the dates

for these hearings and asked the parties how long they expected the hearings to take, the original estimate was ten days. At the time of making this observation, we were in the thirty-first day of hearings with nine more scheduled. Little did we realize then that we were still only at the halfway point. I there made the following observation on the record:

> There are a number of reasons for that, not all of which will be related to my decision as a Board to be latitudinarian in deciding what evidence gets admitted. I think it points to the nature of the proceeding, and the nature of the proceeding is, quite frankly, somewhat nebulous, since there have been few cases of this type. We do not have the same guidance that a Court would have under the Rules of Court. We do not have the same docket pressures that can be used by myself to keep things going, and we also have, I think, the general spirit of the legislation which is more expansive in its nature than you would find in a private dispute; for example, it we were talking about the trial of a civil action.
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> The very magnitude of the entitiies involved, of the business involved, makes it difficult to identify readily, at least from my point of view and, with respect, from the point of view of all of us, what documents are relevant and what are not. For that reason we have regularly had arguments about whether documents that are sought to be introduced are too expansive in scope to serve the particular purpose. Although arguments can be about that question, it is often difficult to tell at the time.
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> If I suggested in my Ruling this morning that the test that I have tried to apply is a negative or a reverse test of "not irrelevant and therefore admissable", then I would like to correct that. My point was simply, and I will reiterate what I said just a few moments ago, that where there is apparent relevance, and I would call it prima facie or even superficial relevance of documents, although it may be difficult to point to their specific relevance at the time, unless that can be countered by a clear argument that that prima facie or superficial relevance, while apparent is not actual, I find myself generally in the position of ... allowing the documents in and ultimately leaving the question of what weight to be given them to the unfolding of the proceedings and ultimately, I suppose, to argument.

Unfortunately, this hearing took almost 80 hearing days and I have also been involved in other lengthy hearings that have also taken place over several years. The result, when coupled with my main professional duties, and a number of other uncontrollable circumstances, has been a most regrettable delay in the issuing of this decision as it has been extremely difficult to find the concentrated periods of time to weigh the evidence and evaluate it.

The effect of "churning" or the movement of workers within the plant has been of considerable concern to Ford. As already discussed, absenteeism is one of the root causes of churning. However, there is also a great deal of movement as a result of job postings or the better job/equal pay program. In 1985, in the chassis department, these two causes resulted in a change in 32% of the total positions in direct labour.

The problems of churning and bumping among the Oakville Plant workforce are, according to Mr. Stawikowski seen as significant cost factors at the Oakville Assembly Plant. He suggested that even the better job/equal pay program, which improves employee morale by providing the opportunity for variety in moving from one job to another, is disliked by the Company because of the bumping effect. A worker who moves to a better job will have to be doubled up for some time in order to receive adequate training. In addition to the increased wage costs associated with that job for the period, the Company is concerned about even short-term effects on quality and production as the person learns the job.

In Mr. Stawikowski's estimation, 99% of the use of double-backs at the Oakville Plant is for the Friday afternoon shift. He recalled a period of several months when the Plant Manager had decreed there should be no double-backs but this decree had to be rescinded because the Friday afternoon shift could not run properly without them and was otherwise experiencing a good deal of mass relief. There is no allocation in the budget that the Oakville Plant receives from Detroit headquarters for the double-backs necessary to run the Friday afternoon shift. Instead, the Oakville Plant simply has to absorb the cost of double-backs as an "over budget" element. Consequently, that extra cost, if the Oakville Plant was to make budget, would have to be set off against any shift where the Oakville Plant was able to produce the budgeted number of units for less than the allocated standard cost.

Mr. Stawikowski was asked what he knew about the S.T.O.P. program in operation at the St. Thomas Assembly Plant. He understood that this program involved creating a pool of labour, consisting mainly of students who were the sons and daughters of family members working at the plant, and that they were training on specific operations. When

workers were absent from those specific operations, they were called in to cover particular jobs and this program was targeted specifically to absences on Friday nights. Counsel for the Commission suggested that this is the sort of program the might have been used or proposed to assist in accommodating the complainants who were asking for specific relief on a specific operation. Mr. Stawikowski responded that such a program had been discussed between the Company and the Union in the past but the negotiations had never resulted in an agreement.

Before Ford decided that it could not accommodate the complainants, its officials considered the terms of the 1984 collective agreement beginning with the seniority provisions in article 15. Under this article, which describes how an individual's seniority affects placement on particular operations, the Company determined that accommodation of the complainants was impossible because their seniority was not adequate to relieve them of the responsibility of working every second Friday night. Furthermore, the Company determined that it was also not possible, under the supplementary provisions governing job advertisements, that the complainants could bid into any straight day job.

Article 20 of the 1984 collective agreement identifies a normal work week for each employee as consisting of forty hours. Mr. Stawikowski was asked whether, by working ten hours Monday through Thursday, the complainants would satisfiy that requirement and still not have to work on Friday afternoons. He replied that the collective agreement, in his view, was contemplating an eight hour daily work schedule so that forty hours equated to five working days rather than four days of thirty-two hours straight time and eight hours overtime. He agreed that this distinction was not found specifically in article 20 but that it was implied by other language in the article which referred to eight hour shifts.

The complainants had brought article 7.01 to the attention of Jim Donagen, the Plant Chairman, and Max McLean, the Industrial Relations Manager in 1985. That article states that the Company and the Union would not discriminate on a number of grounds including creed but Mr. Stawikowski shared the view of Mr. Donagen and Mr. McLean

that the collective agreement covered everybody in the plant, including the complainants and no discrimination could be "made for any individuals whether it be on job postings or any other areas" (volume 32, page 81).

The position taken by the Union, according to Mr. Stawikowski, was that he could not find any means under the collective agreement of accommodating the complainants. His view was that the Union left it in the hands of the Company, taking the position that it was the Company's decision whether to give the complainants every Friday night off and that there was nothing in the collective agreement that said the Company could not give workers days off except for language that discussed adverse effects on Company operations.

Mr. Stawikowski was asked whether it was his opinion that article 7.01, forbidding discrimination on the usual grounds, governed the provisions in the collective agreement regarding seniority. Mr. Stawikowski replied that he did not believe that article 7 superseded the seniority provisions in article 15. In his view, article 7.01 would not allow the respondents to place the complainants in straight day jobs given their lack of seniority according to article 15. To his knowledge, neither the Union nor the Company suggested to the other that article 7.01 required the taken of further steps than were actually taken to accommodate the complainants.

A number of measures were considered by Ford as a means of reducing the cost of Friday night absenteeism. For example, Mr. Stawikowski said that the "two in twenty-one" guideline had fallen into disuse "many years" prior to 1990 with each worker's record reviewed on its merits. For example, a worker who was absent for two Friday nights in a two month period would be looked at differently from another worker who was absent for two consecutive days mid-week in the same two month period. Mr. Stawikowski emphasized that the "two in twenty-one" policy was never a matter of formal agreement but only a kind of measuring stick that was disposed of three or four years earlier.

The Company also considered requiring employees who had been absent to report directly to the Labour Relations Representative rather than to their supervisor. The Labour Relations Representative would then determine whether the absence was authorized before the worker returned to the shop floor. In the Company's view, the Labour Relations Department would then have tighter control and better monitoring of absenteeism and the excuses given for it. The Company has also implemented or considered counselling sessions with employees who have been absent, sending letters to employees in recognition of their perfect attendance, disqualifying leaders or absentee allowances from occupying those positions if they take unauthorized absences, using absentee records as a criterion for accepting or not accepting bids on advertised jobs, closer scrutiny of notes from physicians and even hiring outside agencies to investigate alleged medical absences or absences for other alleged personal reasons.

The Ford Motor Company compiles year-end reports on absenteeism and turnover. If one includes absences on medical grounds, then on the evidence provided in these reports, the number of authorized absences from the workplace significantly exceeds the unauthorized absences at the Oakville Plant. Mr. Stawikowski agreed that the day off in a week policy established by Ford was beneficial to both sides in that it allowed employees' absences from work and gave the Company the opportunity to make appropriate arrangements to cover those absences.

Under the collective agreement, the job of committeeman, which, like the Plant Chairman's job is a straight day job, is only part-time. Consequently the various committeemen are required to work four hours a day on the day shift. They perform operations within their classification as they are required. There are other Union positions as well which work straight days which are not required to perform a full-time work function because of the nature of their Union duties. As these are elected positions, the incumbents might have much less seniority than other workers in the plant.

In continued cross-examination of Mr. Stawikowski by the Commission, a copy of the Commission Investigator's fact-finding notes, as annotated by Mr. Stawikowski, was entered

in evidence; these were dated May 21, 1985. Among the points indicated in the notes was that there was at one time somebody on the labour gang with less seniority than the complainant Mr. Roosma. That person was newly hired as a "pending posting", meaning that he had not yet bid on a job or had been allocated to one. The individual was in the labour gang for several months but Mr. Stawikowski could not remember the precise duration. During the period 1984-1988, it was estimated by Mr. Stawikowski that Ford fired between five and ten workers annually for absenteeism.

Mr. Stawikowski agreed with Commission counsel that Ford's concern in refusing to grant the complainants a leave of absence for Friday nights after sunset, was that to do so would set a precedent that other workers might cite in requesting Friday night off for other reasons that did not involve religious belief. The "day off in the week policy" was noted as having changed in 1988 so that workers could ask for either a Tuesday, Wednesday or Thursday off whereas, for high absenteeism days, being Mondays and Fridays, requests would only be considered and granted "if possible".

Under cross-examination by counsel for the respondent Union, Mr. Stawikowski indicated that neither of the complainants in seeking accommodation had expressed any concern for the effect this might have on the seniority rights of their co-workers. He agreed that seniority is the cornerstone of the collective agreement "or the gospel, so to speak" (volume 36, page 76).

Another effect of seniority was apparent when the Company tried to transfer senior workers out of a department to perform operations in another department where they were needed due to a problem with absenteeism. Under these circumstances, Mr. Stawikowski testified that it had always been the Union's position that the first workers to be transferred out should be the junior people or even the pending postings unless the particular senior individual did not mind going. Another apparent problem was caused by the complainants' desire to be treated as a team. Minutes of the chassis manpower meeting of October 25, 1985 indicated that the arrangement made between the complainants and Anthony and Ripper to change shifts was to be in effect initially for three months. However, it did not work out because either

Anthony or Ripper, according to Mr. Stawikowski, no longer wished to work afternoons after a short time. In the result, although only one replacement worker had taken that view, the entire arrangement for both complainants broke down. However, even when the complainants attempted to arrange a shift swap singly, there were problems. Mr. Roosma had sought to swap with Mr. Kozicki from mid-June through to early October so that Mr. Roosma would be on straight days and Mr. Kozicki would be on straight afternoons. That request was approved by Davey Hall and Greg Search, who was the Labour Relations Representative on the chassis A shift. Again, Mr. Kozicki decided quite quickly that he did not want to work steady afternoons or nights and Mr. Stawikowski concluded that such interim job swap arrangements were unreliable because the participants quickly lost interest.

The second witness for the respondent Company was the Vice-President and Treasurer of the Ford Motor Company of Canada, David G. Rehor. He has held a number of finance positions with the Ford Motor Company of Canada and with Ford-Brazil. He was able to provide a good deal of information about the operations of the Ford Motor Company of Canada particularly relative to Ford's operations in the United States.

Ford Motor Company of Canada is the corporate body that owns the St. Thomas Assembly Plant, the Ontario Truck Plant and the Oakville Assembly Plant as well as some other properties in Canada. However, the management responsibility for the operation of these plants is that of the body and assembly group stationed in Dearborn, Michigan.

When asked about the dynamics of the automobile industry in the past fifteen to twenty years, Mr. Rehor identified the advent of serious competition from Japanese exports followed by two "so called energy crunches" leading to a significant reduction in business activity in the early 1980s. He noted that both the United States and Canadian governments were called on during this time to provide financial assistance to the Chrysler Corporation and he testified that Ford also had serious cash flow problems during the 1980s. During the 1980s, Ford in the U.S. had a cumulative

loss of over $3 billion as a corporation. Significantly, Ford's automotive operations alone would have lost considerably more than $3 billion in North America but that loss was cushioned by the relatively profitable financial services operation of the Ford Motor Company as well as its highly profitable European automotive operations. Since 1978, Ford has closed 15 plants, 12 of which were in North America. Only two of these were assembly plants; the rest were plants that manufactured component parts.

Mr. Rehor assesses the Japanese automakers as having a long-term strategy based on quality and cost competitiveness. As the implementation of this strategy became more successful, Ford recognized that it would have to close the gap in quality and do something about the cost advantage enjoyed by Japanese exports. Ford's concern over losing market share was not just with respect to profitability but also with respect to generating the capital necessary to sustain development. Each new car program cost billions of dollars and the Japanese had furthermore shortened their product cycles so that even a less successful product could be replaced by a new one in only few years. The "product cycle" refers to the time required to move from conceiving of a product to actually introducing it for sale in the marketplace. In the automobile industry of the 1930s, that cycle was less than a year long; by the early 1980s, it had stretched to beyond five years. At the time of testifying, in December 1990, Mr. Rehor indicated that Ford's automobile product cycle would be around 40 months and the cost of bringing a new automobile to market would be at least $2 billion. Since 1988, the North American automobile market has experienced excess capacity as well as a downturn in sales producing what Mr. Rehor described as "an incredibly intense competitive environment". In 1988 Ford's marketing expenses were 6% of sales but this had risen to 12% by 1990. Despite this increase, Ford lost marketshare over the period. He described a steady loss of marketshare by North American automobile producers to the import producers, particularly the Japanese. Not surprisingly, Ford's strategy for moving ahead in this environment was to deliver value for money which Mr. Rehor described as meaning "a competitively priced product at the lowest possible cost to produce, at the highest possible quality". He described a number of programs designed to support this strategy including the "Q1 Award" which is given to outside suppliers who qualify on the basis of quality. This program operates on a timetable

according to which all outside suppliers must eventually achieve Q1 status or they will no longer be eligible to supply products to Ford.

Ford also instituted an internal Q1 program and a number of component plants including two casting plants and the three engines plants in the Windsor area, had all achieved Q1 status. However, the Oakville Assembly Plant was seen as lagging behind and Mr. Rehor described a combined effort on the part of management and the Union to bring the quality at the Oakville Assembly Plant up to at least the quality of its sister plant in Kansas City. He described this program as having some success but indicated that the Oakville Plant was not yet a contender for a Q1 Award. He described that possibility as "some time distant".

The competitive environment, in Mr. Rehor's view, is unlikely to change throughout the 1990s with excess capacity and fierce competition. His expectation was that General Motors might have to close more plants, that Chrysler had at least one plant's worth of excess capacity and that, barring a fundamental turnaround in the direction of the North American automobile industry, Ford itself would have to consider closing another assembly plant in the latter part of the decade. The factors of cost and quality would be key in any such decision. Mr. Rehor went so far as to state his personal view that there will not be three North American automobile manufacturers by the end of this decade.

The specific forecast for the Oakville Assembly Plant was uncertain. In 1990 there were 12 weeks of down time during which workers were temporarily laid off due to a lack of orders. There was also a concern that the Oakville Plant could not provide the clear coat paint finish that customers appeared to be increasingly demanding. New paint facilities need to be put in at the Oakville plant at a cost of $430 million. This has to be done also to support a new product since production of the Tempo/Topaz was to be concluded by 1994.

On September 5, 1988, the Financial Times of Canada published an article that included the following:

> But the prognosis is bleak. A detailed analysis, obtained last week from the Federal government by the Financial Times under the Access to Information Act concludes that of thirteen major Canadian auto plants, Oakville's is the most vulnerable to rising production capacity and stagnant demand. The Department of Regional Industrial Expansion study says that the plant "has potentially significant idle capacity" because it is old, inefficient and increasingly uncompetitive.

Mr. Rehor noted that the study referred to was done in 1987 but that the joint effort referred to above had made some improvement in plant operations, both as to productivity and quality, since then. In his view, it was no longer clearly the case that the Kansas City plant was superior in quality to Oakville.

In cross-examination by the Commission, Mr. Rehor stated that he was not consulted at any time concerning any decisions that Ford made about the complainants nor did he participate in any meetings at which their request to be accommodated was considered or discussed. Obviously, he was called as a witness by the respondent Company to give evidence about the Company's financial position and its relative situation in the marketplace during the period relevant to this case and for the foreseeable future. In light of the general purpose for which he was called, I allowed significant latitude on cross-examination by counsel for the Commission but little relevant or useful information was elicited. This led to several objections by counsel for the Company that the line being pursued was irrelevant and cautions by me to keep the cross-examination focussed to relevant issues of cost and competitiveness. I denied the Commission's request to have the witness produce consolidated financing reviews of Ford's operations in 1989 and 1990. While the Commission was clearly entitled on cross-examination to test the claims of the Ford Motor Company of Canada concerning the degree of competition which it faced, I was not inclined to require the disclosing of these financing reviews. They were described by Mr. Rehor as documents that attempt to ascertain the adequacy of resources against the financial needs of the Ford Motor Company of Canada. They contain projections that take into account a host of factors and they are not particularly concerned with market share; consequently, I was not satisfied that they provided anything useful that was not already contained in documents received in evidence. I further expressed the view (volume 39, page 202) that "frankly, one of my concerns is going to be whether I can even review that documentary material when this hearing comes to a close".

My concern was well-founded. On re-examination, Mr. Rehor emphasized that the prospects for the Oakville Assembly Plant are bleak without any paint facility. He also recalled that the financial news contained in the 1990 annual report of the Ford Motor Company of Canada, introduced as an exhibit by the Commission in cross-examination, showed a net loss of $57 million which was down $371 million from the previous year. Furthermore, the average number of employees was lower by 300 and Ford's share of the car market in Canada dropped from 20.1% to 17.1%.

At the conclusion of the case for the Company, counsel for the Union stated, for purposes of the record, its submission that the Union has not been shown to be a proper party to these proceedings, that a case had not been made out against the Union for constructive discrimination and that it had not been established that there is any burden on the Union to show that it fulfilled any duty of accommodation. Counsel emphasized that the Union would argue these positions at the conclusion of this case and did not want to prejudice its position by the fact that it now intended to call witnesses.

Mr. James Donagen was Plant Chairman at the Oakville Assembly Plant for 24 years prior to his retirement on October 1, 1988. He described the administration of the Union as it operated in the plant between 1984 and 1988. Stewards represent a designated group of employees in designated areas referred to as jurisdictions. They respond to requests to represent workers with problems or disputes arising out of the collective agreement and beyond. If for example a worker claimed that the collective agreement had been violated, it is the steward's responsibility to investigate the complaint and, if the complaint appears justifiable, to discuss the matter with the foreman concerned in an attempt to resolve it. If the matter is not resolved at this stage, the steward then seeks resolution at a higher level by arranging an informal meeting with the superintendent. Ultimately if the matter is not resolved it could be the subject matter of a grievance. Mr. Donagen's view was that the stewards generally would try to resolve these problems without having to go through the formal grievance procedure with is often very lengthy.

Committeemen are members of the local in-plant negotiating committee and are allocated by that committee to represent workers at a particular zone. Their function is to represent those workers in disputes arising under the collective agreement. They are also responsible for co-ordinating the work of the stewards in their particular zones. Unlike stewards, committeemen do not deal with heath and safety matters but they do have the responsibility for monitoring promotions, demotions and manpower reductions in departments within their zones.

The Plant Chairman, Mr. Donagen was responsible for the overall adminstration of the collective agreement and the functioning of the Union within the Oakville Plant. He was also a member of the committee that negotiated the master agreement and the local agreement. These are negotiated simultaneously and the master agreement is not generally ratified until the local unions have settled their local agreements. Prior to amendment or renewal of the collective agreement at both the local and master level, union members are given the opportunity to attend a membership meeting to make suggestions about changes or amendments.

Grievance appeals are dealt with by the in-plant negotiating committee. The union representatives, consisting of the Chairman of the Oakville Assembly Plant and the Truck Plant together with some other committeemen and the President of the union local, meet with their management counterparts from the Labour Relations Department including the Industrial Relations Manager. There are also area meetings, where the committeemen and the stewards of a particular zone meet with the zone superintendents. These are normally held approximately once every two weeks. The most common problem dealt with at these meetings involves manpower such as timelimits affecting transfers and promotions or the alleged failure of the Company to post openings. Other problems discussed at the area meeting would include environmental matters or health and safety or production standards concerns. The Labour Relations representatives attend these meetings as well.

Absence and lateness (A and L) meetings involve the stewards at the floor level. Mr. Donagen explained that a large number of grievances had arisen out of discipline of workers due to absentee and lateness problems and a concerted effort was made to involve the steward and superintendents in their respective areas in ensuring employees avoid absences unless they had satisfactory reasons. The issue of whether reasons were satisfactory was often the focal point of the absence and lateness meetings.

There is also a stewards council of the local union that meets every two weeks. This is attended not only by the stewards but also by the committeemen and the Plant Chairman and the President of the Union Local. At these meetings a variety of problems are discussed arising out of the prominent difficulties being experienced by the stewards at the time. There is also an Executive Board of the Local Union that meets weekly and there are Union Local membership meetings once a month. These meetings are held every third Sunday and notice of them is published on each of the bulletin boards throughout the plant.

Mr. Donagen testified that, as Plant Chairman, he might also be asked to attend Company production meetings that are held every day prior to the start of the day shift. These involve the superintendents and the assistant Plant Manager who review the manpower situation and any other production matters. For example, if it appeared that an attendance problem would mean that the relief system could not operate properly then Mr. Donagen would be invited to discuss the manpower changes that would have to be made in order to run the assembly line. He described absenteeism as a serious problem with mass relief occurring most often on the Friday afternoon shift during the period from 1984 until his retirement in October 1988.

Mr. Donagen indicated that the number one utility worker, referred to as a leader, would occasionally fill in if there was an absenteeism problem but would rarely take over an absent worker's position for an entire shift. The leader's function is to take care of emergency situations, as for example where someone had to obtain first aid, and consequently

Mr. Donagen saw it as in the best interest of management and the union to make sure that leaders were as free as possible. Their function was not to replace absent workers. Mr. Donagen described a leader as usually the key person in an area, capable of handling a number of assigned duties and being integrated into production as required while also assisting and instructing other workers.

Absentee allowances are usually allocated zone by zone since part of their duties involves familiarity with zone operations so that they are able to replace employees who are temporarily absent from their positions. Where the absentee allowances are not able to cover those who are absent from a zone, workers have to be relocated in order to maintain production. Mr. Donagen testified that many complaints resulted from shutting down maintenance operations so that the maintenance workers would be loaned to production to cover for absentees.

Under the collective agreement, special provision has to be made for workers who are determined by the Company medical advisor to have physical limitations. These workers, known as K-14s, have to be found work that enables them to be placed by seniority in their classification. Mr. Donagen testified that when he retired in October 1988 approximately 1,000 workers or almost one in four, had some kind of medical restriction. Those workers are required to be placed according to their seniority in work that they are able to perform. Those workers are first to be placed in their classifications but if work cannot be found for them there, then it must be sought in other departments or on other shifts or even at the other plant in Oakville.

Mr. Donagen also clarified the "better job/equal pay" notion. In minutes of settlement to the collective agreement, the phrase that is used is "reassignment in a classification". This allows workers to seek reassignment consistent with their seniority and Mr. Donagen testified that, to his knowledge, there were no exceptions to the seniority principle being a determining criterion for such reassignment within classification. Under this provision, workers are moved, if they have the seniority, want the job and are able to do it.

The double-back procedure, described at various points above, did not result from negotiations with the Union at the Oakville Plant. It was initiated by the Company in order to offset potential absenteeism on the Friday afternoon shift. In those zones where absentee problems were anticipated, workers on the day shift would be approached and asked if they would be prepared to stay over on the Friday in order to replace an absent worker from the Friday afternoon shift. In Mr. Donagen's view, the double-back system created certain problems in addition to the large number of hours that the double-back worker had to put in at the end of the work week. For example, workers who agreed to double-back on a particular job and then were not needed on that job, were often resistant to being put on another operation if they were unfamiliar with it. He was not aware of the reverse double-back situation -- going from the night shift to the day shift -- being resorted to in order to accommodate absenteeism. He emphasized that the official Union position was that it was opposed to double-backs and the administration of that system was strictly a managerial function.

Mr. Donagen recalled that since the early 1980s the company had taken extraordinary measures to deal with the problem of Friday night absenteeism. According to him, discipline of unauthorized Friday night absences was meted out more strictly than for other absences. Furthermore, because more absences were anticipated on the Friday night shift, workers were more likely to be denied a request for a Friday night off because the foreman would not know how many workers would show up. The so called "two in twenty" rule was not generated under the collective agreement. Instead, it was a guideline used by the Company and ultimately the Company said it could not continue to adhere to that rule because of the severity of Friday night attendance problems.

Mr. Donagen's first knowledge of the complainants and their situation occurred in late 1984 or early 1985 when he was visited by the committeeman Don Ferguson and the steward Davey Hall. They visited Mr. Donagen in his office and he told them that he would talk to Labour Relations personnel and that they should see what could be done to satisfy the complainants at the floor level. Mr. Donagen called Mark Bialkowksi whom he describes as "second in command of Labour Relations". He met with him in the Labour Relations Office a couple of days later and asked what Mr. Bialkowksi

knew about the workers in the chassis department who wanted Friday nights off for religious reasons. Mr. Bialkowski mentioned some of the exceptional suggestions that had been put forward by the complainants such as replacing them on Friday nights with students or placing them on a labour gang or on other steady day jobs in the plant. Mr. Bialkowski said that the Company could not embark on a part-time help arrangement for two individuals who did not have sufficient seniority to be moved to steady day jobs in the plant. Mr. Donagen testified that he responded that he and Mr. Bialkowski "had to seek ways to try to make arrangements to grant time off using the manpower that is available including, down the road, any possible leaves of absence that may occur for religious grounds" (volume 41, page 9). He also mentioned that they should explore the possibility of voluntary arrangements at the floor level. According to Mr. Donagen, Mr. Bialkowski agreed to explore the possibilities he suggested but reiterated his position that the Company could not give them every Friday night off.

Shortly after his meeting with Mr. Bialkowski, Mr. Donagen was visited by the Plant Manager, Frank Wiley. In referring to the complainants, he said that there was no way that the Company could agree to grant every Friday night off because of the seniority provisions in the collective agreement and the manpower difficulties they were experiencing. He said that he had already advised the complainants that they could not be given Friday nights off. Again, Mr. Donagen testified that he told Mr. Wiley that they had to look at the available alternatives such as using leaves of absence or making voluntary arrangements at the floor level. Mr. Wiley agreed.

Subsequently, Mr. Donagen reported to the in-plant committee on his discussions with the Company concerning the complainants situation. Members of the committee were not in favour of making exceptions to the seniority provisions but agreed with the idea of seeking a solution at the floor level as long as other workers were not adversely affected. Mr. Donagen gave a similar report to the Executive Board.

In early 1985, Mr. Donagen was visited in his office by Anita Fox, the Investigator from the Human Rights Commission. She had just previously met with the Company's Labour Relations Department. Ms Fox asked Mr. Donagen why the Union could not accommodate the complainants and he referred to the collective agreement. According to him, she replied that she was not interested in the collective agreement whereupon he mentioned that she might be interested in article 7. She then looked up article 7 and asked him why he was not prepared to lodge a grievance. His response was that there was no violation of the agreement nor would there be any remedy that would not have a serious effect on other rights of other workers in the bargaining unit. Mr. Donagen described Ms Fox as "very annoyed" and she then left his office and headed to the maintenance area.

Subsequent to his meeting with Ms Fox, in about July of 1985, Mr. Donagen met with the complainants at their request in the foreman's office located near the complainants' work area. Also present were Don Ferguson and Davey Hall whom Mr. Donagen described as coming in and out. The complainants noted that they had made a number of requests of the Union and the Company to be accommodated. They suggested having two students replace them on Friday nights and that they could make up the time by working in maintenance on a Sunday at straight time. Mr. Donagen testified that he told them that it would not be acceptable to the Union membership to single them out for special treatment when other workers were also being disciplined for taking Friday nights off. He also felt there would be "challenges from other workers on the basis of seniority rights or handicapped employees, etcetera, under the agreement" (volume 41, page 23). He also mentioned that overtime maintenance work was to be available first to the people in the maintenance department and that Sunday work was seldom required in any event. In his view, granting the complainants' request would have been denying other workers financial benefits to which they were entitled under the collective agreement. Mr. Donagen also advised the complainants that their alternative request to be placed in a steady day job would be impossible given their relatively low seniority. He mentioned that a number of "handicapped and medical people" were already laid off and they would use any such accommodation for the complainants as a pretext for claiming the same right to bump workers out of steady day jobs regardless of seniority. This meeting took approximately three hours with

positions restated on both sides. Mr. Donagen said that Mr. Ferguson joined him in saying that they would see what they could do with respect to leaves of absence and making voluntary arrangements.

Mr. Donagen was asked to give his opinion of the importance of seniority at the Oakville Assembly Plant and under the collective agreement. He was unequivocal in describing seniority as "a cornerstone of the Union. It is the most important thing that a Union has ... ". He explained that when workers reach a certain age they find it difficult to cope with the demands of assembly line work and seek other opportunities in the bargaining unit. Straight day jobs or other jobs off line may enable them to remain employed until they reach retirement age and thus workers view seniority very seriously as a means of enabling them to fairly and equitably maintain employment.

The relative importance of seniority can be seen in the criteria that are applied to the filling of open positions in a department. When such an opening occurs it is posted on the departmental notice board and the employees in that department have the right to bid. Qualifying criteria are ability, willingness and seniority but, as Mr. Donagen explained, seniority is the governing criterion because it is recognized that a certain amount of training can be given as long as someone is physically able to perform the work. It is in fact not required that the bidder be immediately able to perform the job for which the bid is submitted.

Mr. Donagen met with the complainants at the same location on a subsequent occasion. At that point, the complainants were subject to discipline and wished to lodge grievances against the Company for disciplining them and for not accommodating their request for Friday nights off. Mr. Donagen's response was that the Company had stated it could not make the accommodation to guarantee them Friday nights off and that it had the right under the collective agreement to impose discipline subject to the Union's right to grieve. Mr. Donagen further stated that it would not be proper to lodge a grievance without a remedy however he denies ever stating to them that to grant them an accommodation would create a precedent. The complainants did not agree with his explanation. Mr. Donagen testified that Don Ferguson and Davey

Hall talked with him on an ongoing basis about floor level arrangements that were tried with other employees and about the problems that kept arising when the other employees decided not to stay with the arrangement.

The seniority level of the employees at the two Oakville Plants created a problem because of the large numbers of employees whose vacation entitlement exceeded the three-week shut down period. The Company did not wish to hire regular full-time workers to cover for these extended vacation periods so arranged to bring in student replacements for May through September. As required by the collective agreement, these student workers become members of the Union and they are otherwise subject to the provisions of the collective agreement except that they agree upon being hired to leave employment and return to school in September and they do not accumulate seniority. One of the reasons for devising this system was the backlog of full-time applicants for work in the Oakville Plants. These numbered in the thousands according to Mr. Donagen and included workers who had been laid off from other locations. Under the collective agreement, Ford workers who have been displaced from other locations qualify for a special preferential hiring program at Oakville. Seniority is a primary criterion for hiring from the preferential list.

In light of the purpose of the summer student replacement program, it was not considered feasible to have students replace the complainants on Friday nights. Mr. Donagen also testified that even though the complainants indicated that they knew of two students who would be willing to come in on Friday nights, he felt such accommodation would generate grievances from other workers, specifically others that were being disciplined or who might consider such a temporary replacement program desirable for them as well.

When a steady day job is posted in the plant, it is filled usually by employees from that department and attracts a very high level of seniority. Only rarely would a steady day job be posted to the bargaining unit at large. There are no steady day production jobs in the chassis department at the Oakville Plant. Consequently, if the complainants had been put on steady day jobs it would have meant displacing two other people and Mr. Donagen noted that this would raise not

only the seniority question but also the question of whether they were physically able to do the work of the complainants. They would certainly be older workers, who perhaps started when the plant opened in 1953, and might well have been working in off-line operations for some time, possibly with medical restrictions.

In the late 1960s and early 1970s, Ford was asking its workers to put in a good deal of overtime and an increasing number of workers were being disciplined for taking time off and lodging grievances as a result. Union and Management representatives met with officials from the Ministry of Labour and ultimately worked out a solution embodied in the day-off-in-a-week policy. The Friday night shift was not included because it had the heaviest absenteeism rate and the Company would not agree to it. As Mr. Donagen explained, the day-off-in-a-week policy was developed with the hope of reducing Friday night absenteeism. In the absence of such a policy, assembly line workers, by the end the shift on Thursday, had often put in 40 hours including overtime and thus were psychologically more inclined to take the Friday off. Mr. Donagen confirmed that just as the absenteeism rate was higher on the Friday night shift so was the incidence of mass relief.

The gas tank installation and secure job was one of those studied by the plant ergonomics committee with respect to safety and difficulty. Complaints about back and wrist problems were common and some of the workers on the job were also concerned that the production standards were wrong because too little time was being given to perform the job effectively. This led to the installation of an articulating arm to support the gas tanks which meant that one person rather than two was able to perform the operation.

According to Mr. Donagen, the day-off-in-a-week policy did little to change the problem of Friday night absenteeism. Although the revised policy provided for the possibility of granting Friday nights off, this seldom occurred because the foremen at the floor level were concerned about potential absentee problems on Friday nights and would seldom grant the request. The number of requests for other nights off during the week was described by Mr. Donagen

as "not significant" and the problem remained of workers taking Friday nights off without notifying the Company. He also stressed that the policy was never designed to allow workers every Friday night off but that at best it would have allowed some workers to have Friday nights off in rotation with others making the same request.

In 1976, there was some discussion between the Company and the Union over instituting a temporary part-time help arrangement at the Oakville Plant. Under this program, the Company would bring in temporary part-time employees to make up for absences on Mondays and Fridays. These employees would not accumulate seniority and the workers were told that senior workers would have to be moved around in order to provide sufficient flexibility to accommodate temporary and part-time help. According to Mr. Donagen, the Union was also told by the Company that the adoption of this program would not take away from the Company's right to discipline employees for unauthorized absences. The Union apparently saw no advantages to the adoption of such a plan and rejected it in a vote of the membership in approximately 1978.

Mr. Donagen was asked to explain the effect of clause 15.29 in the collective agreement. Paragraph B of this clause provides that exception may be made to the seniority provisions of the collective agreement for employees suffering from major disabilities to enable them to be placed in work that they are able to perform. However, in the event of a lay off, such employees are subject to the seniority provisions of the agreement which would have applied had they not been disabled. However, following recall after a lay off, exception might again be made to the seniority provisions of the collective agreement in favour of such employees. Finally, paragraph C of section 15.29 in the November 18, 1984 collective agreement provides "notwithstanding the foregoing provisions of this section 15.29, any employee who has been incapacitated at his regular work by injury or by compensable occupational disease while employed by the company may be employed in other work in the plant at Oakville which he can do, by mutual agreement between the company and the union, without regard to any seniority provisions of this agreement".

Mr. Donagen was asked whether he had considered the possibility of making exceptions from the seniority provisions of the collective agreement for workers in the position of the complainants. He said that the possibility had been examined but rejected because of the implications. According to this view, if Weller and Roosma had been placed in a steady day job or a job where they would not be working nights, they would have been subject to displacement by someone with greater seniority who was either looking for that kind of work within the bargaining unit or off work on medical disability. He suggested that those on medical lay off who would have been looking for steady day employment or those on medical placements looking for reduced hours because they could not fulfil the total job requirements could equally have lodged a complaint under the Ontario Human Rights Code alleging discrimination on the basis of handicap. He also suggested that the favouring of the two complainants in this way would have attracted a complaint to the Labour Board that the Union was not representing the whole bargaining unit. These concerns were in addition to those arising under the collective agreement which has clear provisions on placement and job postings.

Mr. Donagen also testified that if the complainants had been assigned to work on Sundays at straight time, there would have been grievances from workers who lost their right to work in those positions on Sundays. In a declaration of intent appended to the 1984 collective agreement, the question of overtime distribution is dealt with as follows:

> During the 1984 negotiations the company agreed that when additional employees were required for overtime or extra time in the plant services department, Oakville, on Saturday or Sunday, the employees required will be selected from employees on other shifts in the plant services department who normally perform the work to be done.

There is demand for Sunday work because workers are paid double-time for that day.

Mr. Donagen also described the leave of absence procedure. Under the collective agreement, in article 27, employees desiring a leave of absence are to make in writing an application to their foreman. The application is then dealt with by the Industrial Relations Manager and disputes regarding the disposition of such applications could be the subject of employee grievances. According to Mr. Donagen, article 27 dealt with leaves of absence beyond three days since the

three day request would typically be resolved at the floor level. So, a request by the complainants for a seven-day leave of absence to observe the Feast of Tabernacles would be made under this section but to Mr. Donagen's knowledge this article has never been applied to somebody seeking one day off.

Under cross-examination by counsel for the Commission, Mr. Donagen repeated his view that, dispute having numerous meetings with Mr. Bialkowski to consider what arrangements, informal or otherwise, might be made, there was no effective way of accommodating the complainants. A leave of absence for Friday night would only be granted by the foreman where it was clear that there would not be a manpower problem. He stated that he had received complaints from several other workers, perhaps as many as eight or ten, that the Union was "going overboard" to try and make special arrangements for the complainants and described the Union's concern that the complainants could not be given an ongoing leave of absence for Friday nights when similar requests from others would have to be denied. Other workers regularly asked to have Friday nights off from work and were just as regularly denied because of manpower and absentee problems. Consequently, the Union was particularly concerned not to appear unfair.

In Mr. Donagen's view, similar problems existed concerning the prospect of using double-backs or absentee allowances to cover for the complainants on Friday nights. His personal view was that even if a voluntary double-back arrangement had been reached on a continuing basis or if somehow the complainants could have been accommodated through absentee allowances, there would have been serious problems within the Union. The problems would have arisen because there were others who were being disciplined for Friday night absenteeism and would feel that their reasons were equally compelling. In his view, the sensitivity of those required to work on Friday nights, particularly during periods of extended overtime, was such that the use of double-backs or absentee allowances could only have provided a temporary solution.

The suggestion was made to Mr. Donagen that if the complainants had been moved to jobs which were easier to learn then the impact on the other workers and on the line would be reduced because replacements could learn the jobs more quickly. Mr. Donagen conceded that some problems might be reduced in this way but he emphasized that having the complainants switch jobs would still be significantly disruptive. Because job switches are governed by seniority, any bumping which failed to take account of seniority would have certain ramifications that the Union would take seriously.

The strength of Union feelings on such matters was evident in Mr. Donagen's discussion of the S.T.O.P. program that had operated at the St. Thomas Ford Assembly Plant. Mr. Donagen described the S.T.O.P. program as "a dressed up version of temporary part-time help". Mr. Donagen was presented with a copy of an article from the Toronto Globe and Mail's newspaper's Report on Business concerning the S.T.O.P. program. He was not familiar with most of the information contained in the article but described the CAW Local at St. Thomas as having thrown the program out because they were "completely disgusted" with it. He indicated that the institution of the S.T.O.P. program at the St. Thomas Plant was a Union concession to enable the Company to try to deal with the problem of Friday night absenteeism but that the program had not worked.

When cross-examined by counsel for the respondent Company, he emphasized that the membership of CAW Local 707 was absolutely opposed to a temporary part-time worker program and that it had been voted down. The prospect of adopting a temporary part-time program was left as a local option so that it could be brought in, after a favourable vote by the Union local, by means of a letter of understanding. However, Mr. Donagen was emphatic that any such proposal would have been opposed strongly by local 707.

The other forms of accommodation suggested by the complainants, such as simply putting them on straight days or moving them into a position on the labour gang or janitorial crew were rejected by the Union because of the

complainants' relative lack of seniority. Mr. Donagen emphasized that to make exceptions to seniority in the Oakville Plant would be a particularly sensitive issue because the plant had been built in 1953 and had a number of older workers who had waited a long time to succeed to their positions in the plant. The shell of the existing collective agreement, including some of the seniority provisions, only came about in 1953 after a fifty-four day strike. Mr. Donagen also questions whether a different principle of assigning workers to jobs would have proven more efficient to line operations. In his view, a management right to assign workers to jobs based on management's perception of their individual skills and abilities would have raised concerns of favouritism and arbitrariness that would have created a significant morale problem and dissention within the employee ranks. In cross-examination, the suggestion was made that Mr. Donagen was exaggerating when he described seniority as the most important thing to workers but he repeated his view that seniority "from the Union's standpoint is fundamental and it is very, very important to us. It is the cornerstone of the labour movement. We spend more time on seniority than he have on money, and that is a fact" (volume 47, page 126).

Seniority entitlement is governed by the collective agreement. Mr. Donagen agreed with counsel for the Commission that any solution to the complainants' problem could not contravene the collective agreement. Consequently, when asked whether it would be possible under article 3.04 to contract out the complainants' jobs on Friday nights, Mr. Donagen replied that the Union would not favour that action because it had been fighting to retain work within the bargaining unit but that in any event the section would not apply properly to their circumstances. Even clauses such as 17.08 (e) which allow employees who would not otherwise be eligible for promotion to apply when "by reason of advancing age or on other compassionate grounds" they wished to be transferred to a job in another department, are only allowed to do so "consistent with his/her seniority". Consequently, Mr. Donagen confirmed that this clause would not be suitable to be interpreted as allowing the complainants to be accommodated on the basis that the requirements of their creed gave rise to a compassionate consideration. Indeed, he emphasized the continuing need to preserve the seniority principle in observing article 7.01:

7.01 In continuance of the policy established and maintained since the inception of their collective bargaining relationship, the company and the union acknowledge that the provisions of this agreement shall apply to all employees without discrimination, and in carrying out their respective obligations under this agreement, neither will discriminate against any employee on account of race, creed, colour, nationality, age, sex, ancestry, or place of origin, or against any handicapped employee.

The Union's view, as expression by Mr. Donagen, is that this article requires the Union to administer the collective agreement fairly by not treating anyone differently in carrying out its obligations.

Throughout his several days of giving evidence, Mr. Donagen kept returning to the problems posed by Friday night absenteeism. The problem appears in some respects to feed on itself since one of the ways of coping with absenteeism is to relocate workers to cover the jobs that are vacant. That in turn, led to some workers expressing the view to Mr. Donagen that if they were simply going to be assigned to other jobs that they did not want to do, because some other workers had not felt like showing up, they too would take the time off. Furthermore, the morale of those who did come to work on Friday nights was adversely affected by this resentment. He also recalled workers complaining about repair problems on Friday nights in zone C in the chassis department and about the general difficulties of being shuffled around to meet manpower requirements. He also testified that on Friday nights when the Company had to cover the complainants' operations with unskilled workers, problems were relayed to him about difficulty with keeping up the pace of the line and doing the jobs properly. He agreed that the Union was likely to be more effective than the Company in finding workers who would enter into a voluntary swapping arrangement with the complainants but did not consider that a likely or reasonable solution. The practical problem was that, despite the Union's attempt to find workers who were willing to make such arrangements, few expressed any interest and even those who did swap voluntarily soon decided to give up the arrangement. Equally significant, from Mr. Donagen's point of view, was that even an effective voluntary swapping of shifts could effectively create a steady day job for the complainants. If such an arrangement became known to a K14 with greater seniority who was seeking steady day employment consistent with medical restrictions, Mr. Donagen believes that there could have been a legitimate challenge.

A number of the points made by Mr. Donagen were echoed in the testimony of John Yates and Mike Smorong, who were both absentee allowances on the B shift in zone C of the chassis department from 1984. They confirmed that absenteeism was always at its highest on Friday nights. Mr. Yates described the gas tank job as not really one of the better jobs in the plant because Mr. Roosma's part was hard on the shoulder and Mr. Weller's was "a little quick". He testified that there were many Friday nights when he was required to work on the gas tank job as an absentee allowance and that when other people were required to do it there were quite often problems. As he described it, the straps were sometimes put in backwards, the screws were not put in brake cables and sometimes the gas tanks were not installed at all. When this happened, a repair man would sometimes do the job immediately but there were other times when the vehicle would simply go down the line waiting for the repairs to be picked up. His evidence indicated that this was particulary the case when students were brought in to do the gas tank job because they received only about one hour's training and many vehicles would go by without having the gas tanks installed.

Mr. Smorong described how, if the bolts could not be properly secured, the gas tanks would have to be dropped which would leave the gas tank straps hanging down. He expressed the view that this created a hazardous situation because workers on two of the subsequent operations, motor mount secure and heat shield secure, had to work underneath the car and might be struck in the face with the gas tank straps hanging down. Furthermore, the vehicle would continue into the moon buggy area and the straps had the potential to become tangled in the moon buggy equipment. A significant difficulty created when the gas tank is not installed and secured at the appropriate workstation is that two people are still required to install it further down the line. Consequently, even where a repair man was available, he would have to find somebody else to help him put it in.

Mr. Smorong testified that these problems occurred "pretty much every Friday" that the complainants were not at work if he and Mr. Yates were not available to take over their jobs. He felt that he and Mr. Yates were able to

maintain quality in doing the gas tank jobs but that this did not occur when the problems of Friday night absenteeism required them to be diverted to other areas. He could recall occasions where the line had to be stopped when gas tanks straps got caught in the moon buggy and there was a danger that the car could have been dragged out of the clam shell.

Even where other replacements could be found to work on the gas tanks jobs, they would have to be trained and this would often tie up the absentee allowances or whoever was training them for two to three hours. Sometimes the one doing the training was the relief man and relief was frequently delayed for several hours which upset the other workers on the line. Mr. Smorong testified that a number of workers were also upset because the complainants' absence meant they could not expect to get a Friday night off. He personally would not approve of an exception to the seniority principle according to which the highest seniority applicant to a job is awarded it. He said that he had told Mr. Roosma that he too would not mind going into the labour gang at this stage in his career but that he did not think it was fair to do away with the seniority bidding system. According to his testimony, Mr. Roosma's response was that he did not care about the seniority system but believed that the Company and the Union should be able to do something for him.

Mr. John Anthony has worked at Ford Oakville since April 1966 and worked on the gas tank assembly job on the "A" shift during the period from 1984 to 1988. He emphasized that there is a difference between learning the job, which he believed would take approximately one week and becoming comfortable with it, which he felt took him up to three weeks. He also affirmed that a worker could hold the gas tank for only so long before he would have to "throw it down" and that he had done this many times when he was unable to complete his job on the gas tank.

Mr. Anthony said he was approached by Mr. Weller whom he knew to be in some difficulty because of the conflict between his Sabbath obligations and the Friday night work requirement. Mr. Weller asked him to do his job on Friday nights and added that he did not expect Mr. Anthony to do it for nothing. Initially Mr. Weller paid Mr. Anthony

$50 for each shift that he took over for him and then the amount went to $75. Mr. Anthony would come in on the day shift and having completed it, wait until the afternoon shift and then work that shift in Mr. Weller's place. He cited a number of factors which contributed to the arrangement coming to an end including his own desire to be with his family and the difficulties expressed by Mr. Weller in coming up with the money or equivalent in food vouchers to pay him.

According to Mr. Anthony, there was a good deal of grumbling from the other workers on the "B" shift when he took over for Mr. Weller and this grumbling normally took the form of objecting to the fact that other workers could not get Friday night off. At the time of testifying, Mr. Anthony was a paint repair man and indicated that he regularly applied for jobs on the labour gang but, despite his seniority dating from 1966, he did not think he was yet close to having sufficient seniority to qualify.

Mr. Anthony also described Friday nights as hectic, indicating that the line frequently was required to go on half relief because of low manpower. For the same reason, he indicated that he would not even bother asking for a Friday night off himself because it would not be granted. Instead, he indicated that he would take the matter in his own hands by simply taking the night off when he wanted it.

Mr. Kenneth Hogarth has worked at Ford for over fifteen years and was a grease press operator from 1985 to 1987. He was approached by Mr. Weller who understood that he was looking for an afternoon job and asked if he would like to exchange jobs. When Mr. Weller told Mr. Hogarth what his job was, Mr. Hogarth replied "no, thank you". He explained that there would have been nothing to stop him from making a straight exchange because the job was within his classification but he simply did not what to do the lifting and thought the job would be too difficult for him. At the time he was approached by Mr. Weller, the Plant was working 48 hour shifts and he indicated that absentee problems were particularly pronounced when the Plant was working 48 hours a week. He also testified that it was very difficult

to get a Friday night off because of the manpower problems on Fridays. He testified that he missed his own child's graduation because the Plant went down to mass relief and he could not get the Friday night off.

David or Davey Hall started working at the Oakville Plant in 1964 and has held a variety of jobs in the Plant since then. Mr. Hall indicated that there were some complaints from other workers on the "B" shift concerning the arrangements that were made for the complainants. He indicated that he would get "quite a going over when he walked between zones B and C." He identified one of the leaders in the zone C area in particular who asked what the Union was doing about the situation. His response was that the complainants were entitled to anything the Union could possibly do for them. He indicated that the overtime situation meant Friday night absenteeism was very heavy and there were always several people seeking to get Friday nights off. He also identified other workers who wanted Friday nights off and who would occasionally take them even when they were not authorized. If when they came in on Monday, these workers did not have a doctor's note or some other legitimate reason for being absent, they were then marked down as being on unauthorized absence and, like the complainants, would end up in an absence and lateness interview if they had two such absences within the requisite period of time. He indicated that some of the employees were having physical problems handling the overtime work and wanted the occasional Friday night off to relieve their physical stress.

Mr. Hall was shown a photograph of the moonbuggy and indicated how the gas tank straps could get caught and pull the car out of the clamshell if the gas tank was not installed at its station. He also testified that there was a pronounced increase in the repairs that had to be done when experienced operators were not working on the gas tank installation.

After the arrangement between the complainants and Shaw and Anthony came to an end, Mr. Hall testified that he still attempted to find other workers who would be willing to double-back in order to cover the complainants' positions on Friday nights. For example, on a Friday before they were due to start the night shift, he would ask certain employees

if they would be interested in doubling-back on the next Friday night. If interest was shown, he asked the worker to let the foreman know or sometimes who leave a note in the log book for the steward and ask if that steward knew of anybody who wanted to double-back. A worker named Ripper and Mark Kozicki are two workers who did so. Examples were entered into evidence of log entries where notes were left asking if other workers might be interested in arrangements that would have relieved the complainants on Friday night. As a steward, Mr. Hall was also called to the line to meet with the complainants on a regular basis to discuss their situation and the prospect of making arrangements for Friday night coverage.

Although Mr. Weller indicated in his evidence that he had spoken to Mr. Hall as well as to Mr. Donagen and Mr. Ferguson about grieving his three day and seven day suspensions, Mr. Hall cannot recall him saying anything about it. He does recall that Mr. Weller had showed him a suspension notice and indicated he was going to pursue it as a human rights matter. Mr. Hall did know from his committeeman, Don Ferguson, that the complainants were being subject to progressive discipline in the form of increased suspensions.

Mr. Hall was asked about the general meeting of the union membership that took place on March 23, 1986. Although he recalls attending the meeting and that the complainants' situation was discussed there, he could not recall precisely who spoke or what was said. He does remember urging both Mr. Weller and Mr. Roosma to attend the membership meeting and that one of them responded that they would not attend because they were likely to get a "going over". He told them that this would not happen.

The suggestion was made to Mr. Hall in cross-examination by counsel for the Commission, that the complainants had informed him that they wished to grieve the suspensions they were receiving as part of progressive discipline. However, he denied ever receiving such a request from the complainants. Mr. Hall emphasized that he did take the initiative, as part of normal practice, to take matters up with the general foreman or superintendent if the supervisor denied

a particulary request. He followed this general practice with respect to requests of the complainants that had been denied and recalls going beyond the superintendent to speak to representatives from the Labour Relations department, such as Mr. Stawikowski. According to Mr. Hall, the answer that came back was that the complainants could not be accommodated.

Mr. Hall was closely cross-examined concerning the conversation he had with the complainants about the implications of having large numbers of people who for religious reasons were unable to work on Friday nights. He affirmed that they had told him they would work on Sundays and that when he suggested he as a Catholic did not think he should have to work on his holy day they responded "that was my problem". He pursued the matter further by suggesting that if circumstances got to the point where operations could not continue on Friday nights or on Sundays the Plant could simply be closed up and moved "lock, stock and barrel.... down to the United States". Mr. Hall recalls the complainants response as being "that is not our concern, as long as our rights are not violated."

Mr. Bill Van Gaal started working for Ford in the Oakville Plant in February 1963. He was first elected as a shop steward 1969 and held that position until June 1981 when he was elected Vice-President of the Union. He became President of Local 707 in October 1987. Since 1983 or 1984, the C.A.W. constitution has required that local unions establish a functioning human rights committee. Mr. Van Gaal first chaired that committee of Local 707 and held the position for two terms until the committee was functioning smoothly. This committee operates separately from the collective agreement between Ford and the CAW because it is in place solely because of Union by-laws. The human rights committee has no functioning rights within the Plant and serves an advisory and educational purpose.

As Vice-President of the Union, Mr. Van Gaal had a broad range of administrative duties and these included regular telephone consultations and meetings with the Plant chairs from both the assembly plant and the truck plant. His attendance at the Plant was generally for the purpose of attending meetings although he would occasionally visit the Plant

to investigate a grievance or to assist with the medical placement of a worker. As Vice-President, Mr. Van Gaal also had primary responsibility for handling discharge grievances in the absence of the Union President. All discharge grievances are lodged from the Union Hall rather than from the Plant but the President's Office does not ever initiate discharge grievances on its own. The practice of the local union is not to solicit grievances but to act on behalf of members who make their concerns known.

Notices are posted throughout the Plant of general membership meetings fourteen days in advance of the time stipulated for the meeting. The posting includes the date, time and location of the meeting but the actual agenda is already stipulated by the by-laws and so there would typically not be advance notice of any particular issues other than notices of by-law changes and of elections to be held. Rank and file members are not invited to attend meetings of the steward's council or of the Executive Board. In-plant committee meetings are not the subject of posted notice. They are called by the President of the Union or his delegate and the representatives who participate are notified through the Plant Chairman's office.

Mr. Van Gaal confirmed that he first met with the complainants in October 1984 when they came to his office of the local Union Hall. According to Mr. Van Gaal, the complainants explained that they were considering becoming members of the Worldwide Church of God and that the Church's Sabbath was from sundown Friday to sundown Saturday. They wanted to know what could be done to relieve them of the Friday night work requirement. Mr. Van Gaal asked a number of questions about their religion because he had not heard of the Worldwide Church of God. He also asked questions about the length of their seniority and discussed the difficulties of finding them a day shift position or excusing them from work on Friday nights. He understands their position to have been that the Ford Motor Company was big enough and could look after them. He advised them to work through the Plant by first approaching their supervisors to advise them of their needs and then moving up through the corporate structure to seek some suitable arrangement. He suggested a number of possible courses of action including finding double-backs, or having people swap shifts with them,

but told them that neither steady day jobs nor jobs not requiring them to work on Fridays would be available because of their relative lack of seniority. At that time, the junior person in the labour gang had 1968 seniority and most of the people in steady day jobs had seniority from the 1950s.

The complainants said they would be willing to make up for their missed time on Sundays but he indicated that there was really nothing available for them to do in the Plant on Sundays. The complainants indicated that they were prepared to follow Mr. Van Gaal's advice and would try to work through the Plant and he advised them that his office was available it they were unsuccessful or wanted more assistance or a chance to discuss the matter.

Mr. Van Gaal denied saying to Mr. Roosma at this meeting that if the complainants got Friday night off everybody would want it. He did emphasize, however, that a lot of people did want Friday nights off and the question of Friday night absenteeism had long been a source of debate and discussion between the Company and the Union. As he described it, "the Company has really been pushing and trying to get the Union to buy into some type of a program where they could enforce and have more control on Friday night absences" (volume 59, page 49). The Union objected to the program approach, preferring to deal with individual cases on their own merits. Mr. Van Gaal also referred to a feature of the 1984 negotiations where Ford agreed to distribute paycheques to workers on the day shift on Thursday instead of Friday. In agreeing to do so, Ford required the Union to agree that the practice would end if attendance became a problem on Fridays. Within a year, the Company presented the Union with a document showing the attendance before and after the issuance of paycheques on Thursdays and indicated their wish to stop distributing the cheques early. The Union was able to convince the Company that the attendance problem did not really have anything to do with giving the cheques out early because absenteeism was greatest on the afternoon shift where the workers have been paid on the Thursday evening in any event. However, the Company's document did disclose a serious Friday night absenteeism problem.

After the meeting with the complainants, Mr. Van Gaal felt that they were reasonably satisfied as to what course to follow. They did not indicate to him that they would not come back to see him if a problem developed. He did not hear about the matter again until some months later when Mr. Donegan reported at an Executive meeting that the complainants had lodged complaints against the Ford Motor Company. He left the matter in Mr. Donegan's hands. After Mr. Donegan reported that the Company was not prepared to make an ongoing arrangement to give the complainants Friday nights off, Mr. Van Gaal discussed with him the prospect of finding two people within the department who might be prepared to work steady afternoons so that the complainants could work steady days. To their knowledge the Company was prepared to go along with this sort of arrangement.

In early 1985, Mr. Van Gaal had conversations with Mark Bialkowski of the Labour Relations department. Mr Van Gaal indicated that he dealt with Mr. Bialkowski approximately three or four times a day by telephone over various problems; the subject of the complainants came up from time to time in these conversations. Mr. Bialkowski maintained the position that senior management at the Ford Motor Company were not prepared to create steady day jobs for the complainants or move other people from existing steady day jobs and place the complainants in them.

After Mr. Roosma was notified by the Company that he was to be discharged, he again attended at Mr. Van Gaal's office. Mr. Van Gaal stated that he was surprised because only a few days before he had discussed the prospect of Mr. Roosma's discharge with Max McLean, the Industrial Relations Manager. He indicated to Mr. McLean that the matter was the subject of a human rights inquiry and expressed the view that a discharge would only make the situation worse. He said that he inferred from the conversation with Mr. McLean that the Company was going to consider his request seriously and thus was surprised when they went ahead and terminated Mr. Roosma's employment.

Mr. Van Gaal discussed the options that were available to Mr. Roosma including the possibility that the Union could challenge the Company over his termination or lodge a discharge grievance. However, he indicated that the Union

would have difficulty convincing the Company to take Mr. Roosma back to work unless there was some commitment from him that he would work the scheduled shift hours. Consequently, Mr. Van Gaal asked if there was any way that he could go to the Church or to his Pastor for special dispensation to allow him to work the Friday nights. Mr. Roosma advised him that there was no way he could or would do so. Mr. Van Gaal responded by saying that did not give him much to work on but then advised Mr. Roosma of the plan he proposed to follow in dealing with the discharge problem. He had Mr. Roosma sign two copies of a blank grievance form but indicated that he would not present the grievance to the Company until he had discussions with the in-plant committee as to its merits. In the meantime, he would advise the Company verbally that he wished to put a hold on the time limits that normally apply on lodging a written grievance. He recalls that Sean Melnyk, the section supervisor, agreed to extend the time limits while discussions were continuing with the in-plant committee.

Mr. Van Gaal also explained to Mr. Roosma the other options that existed if the in-plant committee rejected the idea of filing a formal grievance. Initially there could be an appeal to the membership of the local union and Mr. Van Gaal indicated that he was prepared to assist Mr. Roosma in making such a presentation if the in-plant committee did decide against him. He also advised Mr. Roosma that if he was unsuccessful at the local union level or, wished to by-pass it entirely, there was also the option of appealing directly to the National Union.

Mr. Van Gaal made a recommendation to lodge a grievance before the in-plant committee at a meeting on November 10, 1987 but this was unanimously rejected. The members of the committee felt the matter was already the subject of these Board of Inquiry proceedings and there was no accommodation that the Company would agree to that would not also violate the rights of other members of the local union. The following day, Mr. Van Gaal informed Mr. Roosma of the committee's position and also told him that he was prepared to continue having discussions with the Company but felt that these discussions would be fruitless because the Company had "closed the door".

Mr. Van Gaal confirmed that he had advised Davey Hall not to bother lodging a grievance when one of the complainants had a request for a leave of absence denied. Because such a grievance could not be dealt with in time, he advised Mr. Hall to follow the usual procedure of having the committeeman, Mr. Ferguson, bring the matter up with the Company at the next committee meeting. Mr. Van Gaal's experience was that such situations were best handled by in-plant discussions and negotiations with Industrial Relations personnel.

Mr. Van Gaal referred to minutes of various other meetings in which Mr. Donegan had reported on the circumstances surrounding the complainants. These reports included the visit by an investigator from the Ontario Human Rights Commission and the Company's continuing view that permanent alternative arrangements could not be made for the complainants under the circumstances. At the meeting of the Executive Board on September 3, 1985, Mr. Van Gaal reported that he had received a telephone call from the investigator indicating that the Human Rights Complaints would be amended to include the Union as a respondent. On September 15, 1985, Mr. Donegan reported on the situation at the regular membership meeting. He indicated that the Union was now to be a named respondent and that the matter involved two workers who belonged to the Worldwide Church of God and who did not have much seniority but who essentially wished to have steady day jobs. Mr. Van Gaal does not recall that any courses of action were suggested at the meeting and there were no specific motions made that dealt with the issue.

Further discussions between Mr. Van Gaal and the Commission Investigator occurred when she served him with a copy of the amended complaint. He described her as "very much locked in on the one track" that the collective agreement had to be altered in order to allow the complainants Friday nights off. In her view, the Local Union was in a position to make a change to the collective agreement and was obligated to do so. Mr. Van Gaal, on the other hand, believed it was the Company's responsibility and duty to consider what course of action was available to it and "not the Union's duty to infringe the rights of other people". He noted that the collective agreement is entered in to at a specific point for a specific length of time and is not during that time subject to renegotiation. To amend it would have required

obtaining the endorsement of the membership of the Local Union and then the further endorsement of the Ford Council because the Local agreement deals with master contract language. The Ford Council is a national body with membership from the bargaining committees of the five local unions from the Ford Motor Company locations in Ontario. He indicated that the National Union would also have to discuss the matter. Mr. Van Gaal has attended virtually all the membership meetings since 1969 and no such amendment to a collective agreement has every been sought during that time.

At an in-plant committee meeting on February 18, 1986, Mr. Van Gaal, who chaired the meeting, moved that the Union put in leave of absence requests for the complainants for Friday nights and, if they weren't successful, lodge grievances on their behalf. The motion was seconded but when the matter came to a vote it was unanimously defeated. According to Mr. Van Gaal's notes, there were six speakers on the motion, all of whom spoke in opposition to it. The nature of the discussion concerned the Union's rights and obligations in administering the collective agreement and fulfilling its mandate to represent all its members and the consensus was that the Union was already doing so.

On the same date, Mr. Van Gaal reported to the general membership on the formal conciliation meeting that had been held with the Ontario Human Rights Commission and outlined the suggestions that had been made by the Commission for resolving the complainants' difficulties. The first proposal was to bring in students to do the complainants' jobs on Friday nights but there was no provision for doing so in the collective agreement and, as already described above, Local 707 was opposed to creating temporary part-time positions. The next proposal was to put the complainants on steady day jobs but that was clearly unacceptable to the Union because it would displace people who already had these positions by virtue of bidding on them and obtaining them according to their seniority. This was also the basis for rejecting the proposal that the complainants be put into the labour gang since the only day jobs on the labour gang were held by very high seniority employees. Again, this was also the basis for rejecting the proposal that they be placed in inspection positions and the last proposal, that they be allowed to work on Sundays at straight time, was also found to be not feasible. Aside from the difficulties already discussed concerning this proposal, Mr. Van Gaal also pointed out to the

membership that there is seldom any work available on Sundays in any event. Mr. Van Gaal indicated to the membership his feeling that all members should be made aware of the circumstances so that a full discussion could take place the next month at the March meeting. It was his view that the complainants should be formally advised that their situation was to be a subject of discussion and this was done. As already indicated, the complainants did not appear at the March meeting.

At the general membership meeting on March 23, 1986, attendance was estimated by Mr. Van Gaal at 325-350 which he described as significantly more than normal. Notice previously had been given that a discussion would be held concerning the complainants' desire to be accommodated. Those at the meeting were informed that letters of invitation had been sent to the complainants and that a reply had been received from one of them expressing the view that he did not feel anything would be served by attending the meeting. A motion was put forward by Jim Donegan and seconded by Bill Sheppard, Chair of the number three shift in the truck plant, that Local 707 go on record in support of the following:

> We represent the workers as required, and in no event do we assign rights to them that are not available to other workers. Nor do we enter into arrangements that would have the effect of undermining the rights of other workers.

After considerable discussion the motion was carried. Mr. Van Gaal indicated that no speakers were opposed to the motion but some felt that perhaps the Union had not done enough or tried hard enough to force the Company to accommodate the complainants on a regular basis.

Mr. Van Gaal was also asked about three grievances that had been put forward on behalf of Robert Weller. Two of these involved discipline for allegedly appearing at work after the starting buzzer had gone and for an unauthorized absence. In the former case, Mr. Weller claims that the buzzer had in fact gone off early and he did not miss any work and, with respect to the second incident, that he was absent due to an injury to his toe. The third grievance concerns his discharge from the Ford Motor Company. Mr. Van Gaal indicated that these grievances were supported by the Union and that he expected they would eventually come before an arbitrator as the backlog of grievances was cleared up.

On May 28, 1987, Mr. Weller also requested a leave of absence from June 7, 1987 to June 14, 1987 "to take care of personal family business". The leave of absence form was signed-back as not approved by the superintendent. When Mr. Van Gaal became aware, on June 3, 1987, that the leave of absence request had been denied, he followed it up to discover the reason. He was told the next day that the request could not be accommodated because too many workers were out during that period. Mr. Van Gaal then asked that the matter be pursued with the Plant Manager or he would do it himself because the request was critically important for Mr. Weller if he was to avoid discipline. On June 5th, Mr. Van Gaal was advised that the leave of absence had been granted.

In cross-examination by counsel for the commission, Mr. Van Gaal was asked what it was about his experience with the Ford Motor Company that led him to advise the complainants that they were unlikely to be accommodated in their request for Friday nights off. He indicated that in the 1970s he believe a similar situation had arisen with a women employee but she had simply left the employ of the Company. However, he also stated that it was difficult to negotiate a Friday night off for any reason whether it was a wedding, a camping trip or a long weekend.

Mr. Van Gaal was also asked to describe some of the difficulties experienced with the student summer replacement program. The Company requires additional workers in the summertime to cover vacations because the plant shuts down for only a three-week period and a number of people with high seniority have vacations of four or five weeks. Mr. Van Gaal also testified that there is heavy demand for leaves of absence because a number of workers of different ethnic backgrounds wish to visit their homelands. The matter only became a subject of negotiation with the Company in 1986. According to Mr. Van Gaal, this was because of a number of difficulties that occurred in 1985. These included complaints from parents when the company convinced some of the best of the student summer replacements not to go back to school but to stay on at the plant. Another difficulty was the tendency to take student summer replacements

into indirect labour departments such as materials handling, quality control and maintenance, for periods of several weeks. Although these student replacements were in fact covering for vacations, there was a good deal of dissension among the rank and file workers who were angry that they were "slugging it out on the assembly line" when younger people were coming in and taking these prime jobs. Consequently, as part of the local agreement negotiated in 1986, the Union convinced the Company to stop keeping students after the summer vacation period was finished and also to establish a program according to which senior workers in the plant had a right to go into the indirect departments while the student replacements went into the production departments. Under this negotiated program, summer replacement workers do not require seniority.

Mr. Van Gaal emphasized that he had discussed with Mark Bialkowski the possible accommodations that the Company might consider once Mr. Bialkowski made him aware that a human rights complaint had been filed. The possibility of putting double-backs on the job was among these suggestions but Mr. Van Gaal recognized that these were not always available depending on the economic climate; at various times when the plant's budgetary situation was tight, there would be a ban on double-backs. In any event, Mr. Bialkowski had clearly indicated to Mr. Van Gaal that the Company did not consider itself obliged to enter into permanent arrangements to accommodate the complainants. For example, in response to the question of whether Ford ever gave a firm commitment that if the complainants found someone to swap with they would approve of that swap, Mr. Van Gaal noted that certain criteria would first have to be met before a shift swap arrangement would be approved. However, if those making the swap were good employees who could do the job then Mr. Van Gaal did not believe that the Company would object so long as everybody was happy with the arrangements.

The resolution proposed by Mr. Donagen and unanimously supported at the general membership meeting on March 23, 1986, was the first such official position taken by the Local Union concerning the complainants' situation. Mr. Van Gaal believes that the way in which the matter had been dealt with by Union officials in the Plant was consistent with

that resolution. He was asked if it was the result he preferred and responded that he would have preferred "in the end, to have seen Rob and Mike get what they wanted, without infringing on anybody else but as far as adhering to the terms of the collective agreement and protecting the seniority of the senior people in the Plant, yes, that was first and foremost" (volume 63, page 5).

Mr. Van Gaal was asked in cross-examination by counsel for the Commission to explain what sort of absenteeism program the Ford Motor Company was asking the Union to buy into during the 1980s. In general terms, Mr. Van Gaal described the formal program as one according to which employees who were absent or late a specific number of times would receive a specific penalty. After a certain number of infractions, the penalty would quickly escalate to discharge from employment and the Union would be allowed to grieve that discharge only under limited circumstances. Mr. Van Gaal saw this as an invitation to the Union to become party to the Company's discipline procedure and neither he nor the Local Union was inclined to enter into such a program. He acknowledged, however, that the program is in place in some plants in the United States and it has controlled absenteeism. He described recently visiting the Ford Assembly Plant in Atlanta where overall absenteeism during the previous couple of years had been 1 1/2% compared to the 8-9% at Oakville.

The case for the Union concluded with testimony by Committeeman Don Ferguson. He confirmed that absenteeism was most problematic on Friday nights and emphasized that he had done all he could to get Friday nights off for the complainants. However, nothing new came out in the evidence he gave.

In reply, the Commission called Mr. Brian Crockatt of the accounting firm Lindquist, Avey, MacDonald, Baskerville. I accepted his qualifications as an expert in accounting and he gave extensive opinion evidence on the costs of replacing the complainants when they were absent due to their religious obligations. His oral testimony is supported by a detailed written report dated June 2, 1992. In preparing this report, he was asked "to review the transcript evidence as well as the exhibits before the Board of Inquiry and, specifically, to determine the costs attributed by Ford to the absence of

Messrs. Roosma and Weller from the Friday afternoon shifts, and further to determine whether, in [his] opinion those costs as set out were appropriate, and also to determine the impact on Ford of those costs" (Vol. 66, pp. 43-44).

In summary, Mr. Crockatt was able to determine the costs attributed by Ford to the complainants' absences for thirteen of the fifteen specific dates mentioned by Mr. Stawikowski in his testimony; the information was not sufficiently detailed to enable Mr. Crockatt to make a determination for the other two dates. He found that the cost attributed by Ford for those thirteen days amounted to $7,595.62. Mr. Crockatt concluded that the basis for Ford's calculations did not appear to be appropriate. His conclusion was based on Ford's having made its calculations on a "full cost" basis which includes fixed costs in addition to incremental costs; in his view the more appropriate methodology would be to use "incremental costs" as a basis for calculation. Using the incremental cost basis, Mr. Crockatt calculated the cost to Ford for the same thirteen days to be $655.20. He suggested that the financial impact on the Ford Motor Company, no matter what basis was used, is negligible.

Mr. Crockatt also calculated the cost of twenty afternoon shifts for each of the complainants, which he considered to be the approximate number of absences that would be annually required by the complainants. In doing so he used both Ford's full cost basis and the incremental cost basis which he preferred. Those costs respectively for the 1985 year would be $12,710 and $1,132. For each of the years 1986 through 1989, the costs projected by Ford are ten times that projected by Mr. Crockatt. Furthermore, he concluded that the cost calculation contained in Mr. Bialkowski's analysis, "Cost to Replace Complainants" (exhibit 120) was not consistent with either Mr. Stawikowski's calculations or with the incremental cost method that he considered most appropriate.

VII. THE PRIMA FACIE CASE AGAINST FORD

The Ford Motor Company does not contest that a prima facie case has been established against it. The Company required its employees, including the complainants, to work rotating shifts which in turn required them to work Friday

nights after sunset two weeks out of every four, equalling approximately twenty shifts per year. This requirement was established for business purposes and for reasons that were neutral with respect to creed but had an adverse effect on the complainants because of their religious beliefs. Initially, the complainants were adherents or prospective members of the Worldwide Church of God. This religious demonination observes the Sabbath from sunset Friday to sunset Saturday and a requirement of that observance is to refrain from work. The complainants were not relieved of the general requirement to work Friday nights after sunset and stopped doing so in late 1984. A sufficient number of such absences were treated as unauthorized that they were subject to progressive discipline and ultimately fired. Consequently, a prima facie case has clearly been made out against the Ford Motor Company.

VIII THE PRIMA FACIE CASE AGAINST THE UNION

In my second preliminary ruling in this case, discussed above, I concluded that the Union could properly be joined as a respondent, specifically noting the Code's proviso, in section 8, that "no person shall infringe or do directly or indirectly, anything that infringes a right under this Part". In O.P.E.I.U., Local 272 v. Domtar Inc. (the Gohm case referred to above), (1992), 89 D.L.R. (4th) 305, the Ontario Divisional Court upheld the Board of Inquiry's conclusion that the concept of constructive discrimination can apply to trade unions as well as to employers. In that case, a provision in the collective agreement required the complainant to work one Saturday in every six for four hours and this requirement conflicted with her religious beliefs. A majority of the court concluded that the presence of the provision in the agreement was a barrier to her continued employment and ultimately held that the Union was jointly liable to her because it had aided in the creation of the barrier. In Central Okanagan School District No.23 v. Renaud (1993), 95 D.L.R. (4th) 577, the Supreme Court of Canada agreed that a Union could become party to constructive discrimination, thereby triggering the duty to accommodate, "by participating in the formulation of the work rule that has the discriminatory effect on the complainant. This will generally be the case if the rule is a provision in the collective agreement" (page 589). The Court went on to say it may be assumed that the parties to the collective agreement jointly formulate all its provisions and bear equal responsibility for the effect of those provisions on employees.

In this case, the Union is a party to the collective agreement that requires the complainants to work on Friday nights according to the shift rotation schedule. Indeed, the evidence discloses that the Union also pointed to the collective agreement in explaining to the complainants how it was limited, within its own sphere of influence, in the ways it might accommodate their desire to be relieved of the Friday night work requirement. In light of the principles established by these decisions, I find there is equally a prima facie case made out against the Union.

IX HAS THE FORD MOTOR COMPANY DISCHARGED ITS DUTY OF ACCOMMODATION

I have earlier indicated my conclusion that section 10 of the Ontario Human Rights Code 1981 imposes a duty of proving accommodation short of undue hardship where a prima facie case of constructive discrimination on the basis of creed has been made out. As Mr. Justice Sopinka noted, in delivering the judgment of the Supreme Court of Canada in Renaud:

> The duty to accommodate developed as a means limiting the liability of an employer who was found to have discriminated by the bona fide adoption of a workrule without any intention to discriminate. It enabled the employer to justify adverse effect discrimination and thus avoid absolute liability for consequences that were not intended. (p. 589)

The Renaud decision identifies the nature and extent of the duty to accommodate. In that case, the appellant Renaud was an employee of a school board and a member of the Canadian Union of Public Employees. He had been employed by the School Board for three years when, in 1984, he had accumulated sufficient seniority to seek and obtain a Monday to Friday job at an elementary school. The school gymnasium was rented to a community group on Friday evenings at which time a custodian was required to be present. In line with this requirement, the work schedule set by the employer, and included in the collective agreement, established an afternoon shift from 3 p.m. until 11 p.m. during which only one custodian was on duty. Mr. Renaud's religious beliefs, drawn from the Seventh-day Adventist creed, required him to refrain from working while observing the church's Sabbath which ran from sunset Friday until sunset Saturday. The facts are further set out in the judgment of the Supreme Court of Canada at page 579-580:

> The appellant met with a representative of the School Board to try to accommodate his inability to work the full Friday shift. The School Board representative was agreeable to the request but indicated

that the School Board required the consent of the Union if any accommodation involved an exception to the collective agreement. Many of the alternatives discussed by the representative and the appellant involved transfer to "prime" positions which the appellant did not have enough seniority to secure. The appellant was reluctant to accept a further alternative, that he work a four-day week, as this would result in a substantial loss in pay. In spite of these possibilities and other alternatives that could perhaps have been implemented without the Union's consent, the employer concluded that the only practical alternative was to create a Sunday to Thursday shift for the appellant which did require the consent of the Union.

The Union had a meeting to discuss making an exception for the appellant but instead it passed the following motion:

> That the Kelowna Sub-Local of Local 523 demand that management of SD#23 rescind the proposal of placing any employee on a Sunday-Thursday shift. If, failing this agreement, a Policy Grievance be filed immediately to prevent the implementation of this proposal due to the severe violations of the Collective Agreement.

The appellant was informed of the rejection of the proposed accommodation and the ongoing requirement to work on Friday nights. He was also informed of the intention of the School Board to continue to seek a viable accommodation. After further unsuccessful attempts to accommodate, the School Board eventually terminated the appellant's employment as a result of his refusal to complete his regular Friday night shift.

The major question, of course, is how to define "undue hardship". In Renaud, the Supreme Court of Canada was urged to adopt the definition of undue hardship set out by the Supreme Court of the United States in Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977). There the United States Supreme Court stated, at pp. 84-5:

> To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship ... to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion. By suggesting that TWA should incur certain costs in order to give Hardison Saturdays off ... would in effect require TWA to finance an additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs. While incurring extra costs to secure a replacement for Hardison might remove the necessity of compelling another employee to work involuntarily in Hardison's place, it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs. (quoted at page 584 of the Renaud decision).

Mr. Justice Sopinka describes this definition as being "in direct conflict with the explanation of undue hardship in O'Malley" (page 584; see Ontario (Human Rights Commission) v. Simpson's-Sears Ltd., [1985] 2 S.C.R. 536 discussed above). He also notes that there is "good reason" not to adopt the Hardison de minimis test in Canada because Hardison, which was

argued on the basis of the establishment clause of the First Amendment of the United States Constitution and its prohibition against the establishment of religion, was "decided within an entirely different legal context".

In O'Malley, the Supreme Court of Canada referred to the Hardison decision in concluding that the concept of a "duty to accommodate short of undue hardship" had been adopted in Canada; however, as noted by Justice Sopinka in Renaud, the Court in O'Malley did not adopt the de minimis test propounded in Hardison. It is instructive to review the reasoning of the Supreme Court of Canada in O'Malley as set out immediately prior to its reference to the Hardison decision:

> No question arises in a case involving direct discrimination. Where a working rule or condition of employment is found to be discriminatory on a prohibited ground and fails to meet any statutory justification test, it is simply struck down: see the Etobicoke case [[1982] 1 S.C.R. 202]. In the case of discrimination on the basis of creed resulting from the effect of a condition or rule rationally related to the performance of the job and not on its face discriminatory a different results follows. The working rule or condition is not struck down, but its effect on the complainant must be considered, and if the purpose of the Ontario Human Rights Code is to be given effect some accommodation must be required from the employer for the benefit of the complainant. The Code must be construed and flexibly applied to protect the right of the employee who is subject to discrimination and also to protect the right of the employer to proceed with the lawful conduct of his business. The Code was not intended to accord rights to one to the exclusion of the rights of the other. American courts have meet this problem with what has been described as a "duty to accommodate", short of undue hardship, on the part of the employer.... . (pp. 552-553).

Speaking for the unanimous court in O'Malley, Mr. Justice McIntyre quoted the Board of Inquiry's formulation of the duty to accommodate short of undue hardship as "the very general standard of whether the employer acted reasonably in attempting to accommodate the employee in all the circumstances of the case as well in the context of the general scope and objects of the Code". Given that there was no expressed statutory base for this concept in the Code, he then asked the question whether this doctrine should be imported to fill the vacuum:

> The question is not free from difficulty. No problem is found with the proposition that a person should be free to adopt any religion he or she may choose and to observe the tenets of that faith. This general concept of freedom of religion has been well established in our society and was a recognized and protected right long before the Human Rights Codes of recent appearance were enacted. Difficulty arises when the question is posed of how the far the person is entitled to go in the exercise of his

religious freedom. At what point in the profession of his faith and the observance of its rules does he go beyond the mere exercise of his rights and seek to enforce upon others conformance with his beliefs? To what extent, if any, in the exercise of his religion is a person entitled to impose a liability upon another to do some act or accept some obligation he would not otherwise have done or accepted? In a clear case involving legislation - see: R v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 - The Lord's Day Act was struck down essentially for the reason that its effect was to impose upon minority groups a legal duty to observe the Christian Sabbath. To put the question in the individual context of this case: in the honest desire to exercise her religious practices how far can an employee compel her employer in the conduct of its business to conform with or to accommodate such practices? How far, it may be asked, may the same requirement be made of fellow employees and, for that matter, of the general public?

These questions raise difficult problems. It is not, in my view, either wise or possible to venture an answer that would apply generally. We are, however, faced with the necessity of finding an answer at least for this case and, therefore, in the nature of the judicial process an answer for similar cases ... . In any society the rights of one will inevitably come into conflict with the rights of others. It is obvious then that all rights must be limited in the interest of preserving a social structure in which each right may receive protection without undue interference with others. This will be especially important where special relationships exist, in the case at bar the relationship of employer and employee. ...

Accepting the proposition that there is a duty to accommodate imposed on the employer, it becomes necessary to put some realistic limit upon it. The duty in a case of adverse effect discrimination on the basis of religion or creed is to take reasonable steps to accommodate the complainant, short of undue hardship: in other words, to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer. Cases such as this raise a very different issue from those which rest on direct discrimination. Where direct discrimination is shown the employer must justify the rule, if such a step is possible under the enactment in question, or it is struck down. Where there is adverse effect discrimination on account of creed the offending order or rule will not necessarily be struck down. It will survive in most cases because its discriminatory effect is limited to one person or to one group, and it is the effect upon them rather than upon the general work force which must be considered. In such cases there is no question of justification raised because the rule, if rationally connected to the employment, needs no justification; what is required is some measure of accommodation. The employer must take reasonable steps towards that end which may or may not result in full accommodation. Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment. (pp. 553-555).

The content of the duty to accommodate was further augmented by the Supreme Court of Canada in Renaud:

More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term "undue" infers that some hardship is acceptable; it is only "undue" hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words "reasonable" and "short of undue hardship". These are not independent criteria but are alternate ways of expressing the same concept. What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case." (p. 585)

The question of what constitutes undue hardship was also considered by the Supreme Court of Canada in Alberta Human Rights Commission v. Central Alberta Dairy Pool (1990), 72 D.L.R. (4th) 417. In that case, a worker in a milk processing plant became a prospective member of the Worldwide Church of God in February, 1983. He requested to work the early shift on Fridays in order to avoid the conflict between his work schedule and his Sabbath observance and this request was granted. On March 25, 1983, he requested permission through his supervisor to take unpaid leave on Tuesday, March 29th and Monday, April 4th, in order to observe two holy days. The latter day was Easter Monday and he offered to work alternative days outside his regular schedule in consideration for his absence on these two holy days. His supervisor responded that he would be allowed to be absent on the Tuesday but the plant operating needs required that he be present for work on Easter Monday. Speaking for four of the seven justices, Madam Justice Wilson said that she did not find it necessary to provide a comprehensive definition of what constituted undue hardship but felt it might be helpful to list some of the factors that may be relevant:

> I begin by adopting those identified by the Board of Inquiry in the case at bar - financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the workforce and facilities can be adapted to the circumstances. Where safety is an issue both the magnitude of the risk and the identity of those who bear it are relevant considerations. This list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case.
>
> In the case at bar the board of inquiry found as a fact that concerns of cost, disruption of a collective agreement, employee morale and interchangeability of work force did not pose serious obstacles to accommodating the complainant's religious needs by permitting him to be absent on Monday, April 4, 1983. Indeed, it would be very difficult to conclude otherwise in light of the existence of a contingency plan for dealing with sporadic Monday absences. If the employer can cope with an employee's being sick or away on vacation on Mondays, it can surely accommodate a similarly isolated absence of an employee due to religious obligation. I emphasize once again that there is nothing in the evidence to suggest that Monday absences of the complainant would have become routine or that the general attendance record of the complainant was a subject of concern. The ability of the respondent to accommodate the complainant on this occasion was on the evidence, obvious and, to my mind, incontrovertible. I therefore find that the respondent has failed to discharge its burden of proving that it accommodated the complainant up to the point of undue hardship. (p. 439).

In the case before me, I conclude that the respondent Ford Motor Company has discharged its burden of proving that it accommodated the complainants up to the point of undue hardship. I reach this conclusion in light of the factors that I consider to be relevant in light of the authorities cited and on a thorough review of the extensive evidence presented to me. Before reviewing those factors, I acknowledge the different result reached by the Board of Inquiry in the Gohm case in circumstances which are similar in some respects but significantly different in others.

The complainant Gohm was a Seventh-Day Adventist who began work as a junior lab technician at Domtar in August 1981. The major responsibility was to collect and test effluent from a pulp and paper mill and also to collect and test samples of air emissions. This was required in order to ensure that Domtar was complying with provincial enviromental standards. The lab staff included six junior technicians and two process engineers as well as a senior lab technician and the lab supervisor. The lab technicians were required to work on Saturdays on a rotating basis. This requirement was explained to Ms Gohm when she was interviewed for the position but she did not indicate during that interview that her religion prevented her from complying with the Saturday work requirement. In her evidence before the Board of Inquiry she indicated that she would not have been hired for the position if she had indicated the potential problem and that she hoped to make an arrangement to accommodate her needs. This hope was based on her assessment of the work that would be required of her as a lab technician as described during the interview. The technician on the Saturday shift collected samples which were tested on Monday and also tested those samples taken on the Friday. The lab technicians were members of the Office and Professional Employees International Union.

Ms Gohm was regarded as an excellent employee. When the first Saturday shift schedule was posted one month in advance, she informed her supervisor that her religious beliefs prevented her from working on Saturday and sought help in making arrangments to accommodate those beliefs. The main focus of their discussion was to let her work on Sunday instead of Saturday and her supervisor agreed that there was no technical reason why the testing could not be done on Sunday rather than Saturday. However, upon further investigation, the supervisor indicated that there might be a problem

with the Union. Ms Gohm spoke to the Union president about not being able to work on Saturday due to her religious convictions and initially received a favourable response. The Union indicated that a swap of days might be arranged but that the arrangement would have to be kept quiet.

The Personnel Supervisor was not in favour of allowing Ms Gohm to switch shifts as he felt this would set a precedent for others such as members of the Jewish and Ukranian Orthodox faiths. Furthermore, the employer did not think it would be fair to pay Ms Gohm at time and a half for working Sunday (as would otherwise be required) since straight time was paid to those who worked on the Saturday shift. Ms Gohm had only requested straight time pay for the Sunday work but the Union president in turn stated that the Union could not agree to accommodating her by allowing Sunday work at straight time.

At a meeting held in early September between a representative of the employer and the president of the Union, the Union confirmed that it would not accept any accommodation that would allow the complainant to work on Sunday at straight time. The Union President also testified that, at the time of attending the meeting, she was under the impression that the Company had already determined that it would not re-open the collective agreeement; without doing so it would not have been possible to accommodate Ms Gohm's request to work on Sundays at straight time in any event. The Union's position was that the collective agreement stipulated that Sunday work was to be paid on an overtime basis and that the Union was bound to uphold the agreement.

There had recently been considerable friction between the Company and the Union regarding overtime pay. This arose out of the Union's stand against the practice whereby supervisors had negotiated leaves of absence with employees who would be granted the leave of absence in return for agreeing to work extra hours at straight time to repay the time off. The President of the Union believed that this practice contravened the collective agreement which required overtime

pay for work done beyond normal working hours and she also took the position that it was improper for ad hoc agreements to be made between individual employees and their supervisors without the Union being involved.

On September 23, 1981, Ms Gohm received a letter terminating her employment as of October 9, 1981. The Company indicated that it was prepared to allow her to do Sunday work at straight time but that Union agreement was required for this arrangment because it contravened the collective agreement. This led Ms Gohm to talk further with the Union but letters back and forth between the parties indicate that the impasse between them continued. In February 1982, Domtar again advertised for a junior lab technician and, after interviewing Ms Gohm, agreed to re-hire her provided that she undertook to abide by the collective agreement and make herself available for work as required. Ms Gohm was unable to provide such assurance and was thus not re-hired by the Company.

After reviewing the judgment of Mr. Justice McIntyre in the O'Malley case, the Board of Inquiry in Gohm stated the following:

> The interpretation of the concept of reasonable accommodation short of undue hardship that I adopt here reflects the interpretative guidelines established by the Supreme Court of Canada in the cases cited earlier. In particular, I am guided by the cases which emphasize that the purposive approach entails two corollary principles: first, the principle that the substantive prohibitions of discrimination in these laws must receive a broad and generous interpretation and second, the principle that exceptions or defenses in these laws must be narrowly construed, so as not to defeat the purpose of the statutes: see Etobicoke, supra , and Brossard [Brossard (Town) v. Quebec (Comm.) des Droits de la Personne), [1988] 2 S.C.R. 279] (p. D/175)
>
> In Renaud the member designate of the British Columbia Human Rights Council followed the established principle that the collective agreement was subject to the Human Rights Act since the Human Rights Code "is a public and fundamental law [and] no one, unless clearly authorized by law to do so, may contractually agree to suspend its operation and thereby put oneself beyond the reach of its protection"; Insurance Corp. of British Columbia v. Heerspink, [1982] 2 S.C.R. 145.

The Etobicoke case, referred by the Board of Inquiry in Gohm, confirms that parties to a collective agreement are not competent to contract out of the provisions of Human Rights Codes and that any agreements purporting to have such effect would be contrary to public policy.

In Renaud, the respondent School Board argued that this principle should not apply in the case of adverse effect discrimination because the offending provision would not be struck down, as it would be in the case of direct discrimination, but would be upheld in its general application subject to the duty to accommodate a complainant. The Supreme Court of Canada in Renaud expressly stated that it did not accept this submission, stating that adverse effect discrimination was prohibited by the legislation no less than direct discrimination. However, the Court went on to say the following:

> While the provisions of a collective agreement cannot absolve the parties from the duty to accommodate, the effect of the agreement is relevant in assessing the degree of hardship occasioned by interference with the terms thereof. Substantial departure from the normal operation of the conditions and terms of employment in the collective agreement may constitute undue interference in the operation of the employer's business. (p. 587)

In light of the principles established by the Supreme Court of Canada, I conclude that the Ford Motor Company is not required to take further steps to accommodate the complainants because to do so would constitute undue interference in the operation of its business.

When the complainants approached Mr. Stawikowski in late 1984, they advised him that they could not work Friday nights from that point forward. Mr. Stawikowski discussed the issue with Mr. Bialkowski and Mr. Wiley and Mr. McLean considered a number of options but found them not to be feasible. At an early stage, they conveyed to Mr. Roosma the lack of opportunity for steady day work for someone with his seniority especially in light of the number of other employees who, for medical or other reasons, would also have valid reasons for wishing to work steady days.

Near the beginning of these reasons, I have set out the reasons for my decision, on a preliminary motion, that section 10 of the Human Rights Code, 1981, does impose a duty of reasonable accommodation. I there described the relationship between the bona fide occupational requirement and the duty to accommodate in a case of adverse effect discrimination as follows:

> A neutral "requirement, qualification or consideration" which gives rise to constructive discrimination is only allowed to operate as an exception where it is reasonable or bona fide in the circumstances. And it is only reasonable in the circumstances, consistent with O'Malley, if accommodation cannot be accomplished without undue hardship.

This view, that the duty to accommodate short of undue hardship should be dealt with in the context of the bona fide occupational qualification, exception or defence, was concurred in by Mr. Justice Sopinka who gave the minority judgment on behalf of Justices La Forest and McLachlin in the Central Alberta Dairy Pool case (see, specifically page 528). The relevant circumstances must include the competitive position of the Ford Motor Company, and of the Oakville Assembly Plant in particular, in the North American automobile industry. Mr. Rehor's evidence paints a clear picture of the North American automobile industry that is intensely competitive. The evidence is clear that North American domestic automobile manufacturers, including Ford, have lost market share to off-shore competitors for the past several years and that Ford's response has included closing a dozen North American plants since 1978. Losses on its worldwide operations in the early 1980s ran into the billions of dollars as Ford began to recognize that it had, in the words of Mr. Rehor, "both a cost and quality crisis" especially relative to the Japanese automobile manufacturers. He referred to the Japanese manufacturers as having earned their reputation "one car at a time" and to their long term strategy of seeking a lifetime relationship with buyers based on quality and cost competitiveness. On the evidence it is clear that the Ford Company decided that a renewed commitment to quality was necessary to its health and survival. Although counsel for the Commission suggested that this was an exaggerated notion, I note among the documents submitted with Mr. Rehor's exhibit book (exhibit 186) newspaper articles discussing the very issue of whether the Ford Motor Company could maintain its viability. Indeed, the prevalence of quality as a theme throughout the Ford Motor Company is reflected in the extent to which it is referred to on the evidence before me.

At the same time that there has developed a fundamental concern over quality, there has been a concurrent emphasis on reducing costs. A powerful indicator of that emphasis is seen in Mr. Rehor's evidence that the number of employees in Ford's North American operations fell by one-third in the decade between 1980 and 1990. This dual emphasis on quality and cost also increases the competitiveness among Ford's own plants. There is clear and uncontradicted evidence that the Oakville plant compared unfavourably with the Kansas City plant from the standpoint of both quality and cost. It is also significant that, although the Oakville Assembly Plant is part of Ford of Canada's operations, the real decisions concerning budget and production standards are made at Ford's Headquarters in Detroit; for operational purposes Ford of Canada is little more than a holding company.

Another important circumstance within which Ford's duty to accommodate must be considered is the rate of absenteeism at the Oakville plant. Again, the evidence is clear that whereas the Canadian assembly plants enjoyed a cost advantage arising out of the exchange rate differential, this advantage was seriously eroded by higher absentee rates. Oakville's rate in recent years has consistently been higher than Kansas City's and Mr. Van Gaal testified that Oakville's absentee rate of between 8-9% contrasted with Ford's automobile assembly plant in Atlanta, Georgia where the absentee rate was 1.5%.

The evidence from those working at the Oakville Plant, as set out above, shows unequivocally that absenteeism without leave was highest on the Friday night shift. The evidence discloses that there were significant manpower problems on Friday nights because of these absences with the incidence of mass relief very much higher than on the other shifts (exhibit 95). Double-backs appear to have been used virtually exclusively to deal with Friday night absenteeism and the Company's concern with Friday night absenteeism is a recurring theme on the evidence presented before me. Indeed, mass relief arising out of the inability to mount the assembly line operation, is only the worst of a number of seriously debilitating effects. The problem of churning, or movement of workers within the plant, was particularly pronounced as workers had to be relocated in order to fill the gaps and there were both quality and cost implications as workers were

required to perform unfamiliar tasks. Indeed, the evidence is that as workers approached the final shift of a 48-hour work week, the anticipated absenteeism problem became self-fulfilling as workers preferred to stay away rather than be assigned to a job with which they were not familiar. Mr. Roosma, who by all accounts is an excellent worker, testified that his job would require only five minutes training but other witnesses indicated that proper training would take much longer and that the period required to feel comfortable in performing most jobs would be days or even weeks.

The record in this case contains a number of reports relating to absenteeism and the problems it creates. It is clear that the budget parameters established by Ford Headquarters in Detroit make little provision for covering for absentees. For example, the overtime costs of bringing in double-backs are not covered by the budget and the highly complex churning phenomenon gives rise to a variety of incremental costs that are difficult to identify in such a large and complex operation. In giving his opinion on costs, Mr. Crockatt acknowledged that there were too many factors to measure in trying to determine the dollar cost to Ford of the complainants' absences. The cost and quality implications are clearly different depending on who replaced them, who, if anyone, in turn took over the functions of their replacement workers and so forth. As a circumstance relevant to identifying the extent of the duty to accommodate, the notion of cost extends not only to the wage and benefit rate of those replacing the complainants on a Friday night shift, but also to the real cost of resulting declines in both quality and production. Although these are difficult to measure, the evidence discloses that they were real. In my view, Mr. Crockatt's determination of cost is undermined by his inability to assess how the problems of churning contributed to the incremental costs of the complainants' absences.

The position of absentee allowance is the most obvious and forthright means of dealing with absenteeism. Each zone has a number of absentee allowances who are trained on jobs in that particular zone; there were two such absentee allowances in zone C where the complainants worked. However, the job of the absentee allowance is to cover for employees who might be absent for a variety of reasons and not to be a permanent replacement for workers who are not able to work a particular shift on a continuing basis.

The evidence is clear that the absentee allowances were not always available to cover the complainants' positions when they were absent on Friday nights and, even where they did fill in, there was often other absenteeism that had to be covered in some way. Mr. Donagen testified that the number of absentee allowances has increased significantly over the past twenty years but his evidence further indicates that this was insufficient to deal with the problem. He referred to a constant stream of complaints coming from workers in the labour gang whose operations were regularly shut down so that they could be moved into production jobs to cover for absent workers.

Where the absentee allowances were not available, two employees were frequently doubled-up on a job to cover it. The very fact of requiring a double-up appears to mean that these workers would require training and the evidence indicates that the leader would typically spend the first part of the shift doing so. It also appears on the evidence that this training would frequently not be sufficient to prevent against a higher incidence of repairs.

Depending on the degree of absenteeism on a Friday night, it might be possible to have a relief man take over one of the complainants' jobs. Mr. Crockatt's report seems to suggest that there would be no cost to the Company when the relief man was available to cover the job but, as noted by counsel for the Company, mass relief is likely to follow when the relief men cannot do their jobs and there is a significant cost to the Company when the assembly line stops moving. I also accept the evidence given by Mr. Stawikowski that when relief is delayed or denied to the workers there is a detrimental effect on morale. There is also considerable discussion on the evidence of workers doubling-back or voluntarily staying to do the afternoon shift. However, this is done on a volunteer basis as supervisors canvas day shift workers and there can be no assurance that those who so volunteer will necessarily possess the skills that will be required depending on who fails to appear on the Friday night shift. More importantly perhaps, the complainants themselves testified convincingly to the extreme fatigue created by having to work sixteen hours a day. In this situation, the implications go beyond matters of quality to encompass genuine concerns about safety.

The overwhelming impression on the evidence is that the complainants need to be freed from the obligation of working Friday nights exacerbated an already difficult absenteeism problem. They were both highly competent workers who performed their jobs admirably as regular operators and the various attempts to replace them were attended by significant difficulties. There was no practicable way for the Company to accommodate their religious needs short of undue hardship.

The difficulty of attaching a dollar value as the cost of the complainants' absences on Friday nights has already been identified and there is a significant difference between the Company's estimate, as shown in the evidence of Mr. Stawikowski, and the incremental cost calculated by Mr. Crockatt. As I have indicated above, the notion of "cost" in the circumstances of this case is informed by a range of variables that make quantification difficult. However, Mr. Crockatt's analysis is unduly restrictive in calculating the costs incurred by the Company in making up for the complainants' absences on Friday nights. For example, regarding the date of January 25, 1985, Mr. Stawikowski's evidence, as summarized by Mr. Crockatt, identifies the following as having been involved in covering for the complainants:

> One double-back who worked for four hours, a second who worked for six hours, a third who worked for two hours, Mr. Smorong who spent four hours in training and the supervisor, Mr. Sokic, who was involved for two hours. Thus, instead of the two regular operators, there were five different people involved, three of whom were being paid time and a half, and these included the absentee allowance who, had he not been on this job, could have been somewhere else.

The daily manpower report (exhibit 100) indicates that there were in fact ten more absences in the area than had been budgeted for with only six double-backs including the three who spent a certain portion of the shift working in the complainants' place. Of these three, one knew the job, a second did not and no one is sure about the third. However, with the fact being that on that date there were already eight absences besides the complainants in excess of the number budgeted for and that five people, three of them paid at time and a half, were on the job for a total of eighteen hours, Mr. Crockatt's estimate that the incremental cost to the Company was $15.70 appears unrepresentative and unrealistic. On the question of dollar cost, I generally find that the Company's estimate is to be preferred over Mr. Crockatt's; Mr.

Crockatt appears to have treated as relevant only those costs which he could specifically quantify but in my view he has not captured all the relevant costs.

Within the context of these circumstances, the degree of hardship of the various possibilities of accommodation must be evaluated. Swapping shifts with two other employees to cover Friday nights was a possibility and this actually occurred at times. The Commission argues that both the Company and the Union could have done more to arrange shift swaps and, while I deal with that point below in greater detail, I note that the complainants themselves referred to the experience as "very exhausting" and "too much". There is some evidence that both the Company and the Union attempted to identify workers who would be willing to swap shifts but that these arrangements fell through because the replacement workers did not wish to continue the voluntary arrangement. The fact is that workers generally did not like to work on Friday nights. Furthermore, it was certainly Mr. Donagen's view, on behalf of the Union, that the Company would be, if anything, less successful than the Union in encouraging workers to volunteer to swap shifts with the complainants.

A number of the difficulties with the shift swap option apply also to the potential use of double-backs. Aside from the premium cost factor, and the fact that Detroit Headquarters occasionally refused to allow the use of double-backs because of budgetary pressure, there are the problems with fatigue and with the voluntary nature of the double-back arrangement. Those who did volunteer might well not have the skills to match the job and, as volunteers, could also decide that they did not wish to stay. Similarly, the option of using the absentee allowances to replace the complainants on Friday nights on an ongoing basis was impractical. The very functions that absentee allowances are supposed to fulfil run counter to the notion of assigning them as permanent replacements for the complainants on Friday nights. More significantly, the absentee problem was such that other duties, such as work at the moonbuggy, might require their attention first.

Neither does the evidence disclose that the Company could have avoided undue hardship by granting the complainants ongoing leaves of absence for Friday nights. The pressing problem of Friday night absenteeism would still be exacerbated with all the intended

quality and cost difficulties of not having the regular operators available to do the job. Furthermore, the evidence discloses a sufficient problem with employee morale regarding Friday night work that significant further deterioration would have occurred if leaves of absence were routinely granted to the complainants. Other employees appear to have been refused a request for a Friday night off because of Company concerns over being able to meet its manpower requirements. It is worth noting that the complainants were granted leaves of absence to observe their religious high holidays.

The option of moving the complainants to other jobs was also raised but such movement of employees is governed by the collective agreement which has the principle of seniority as its foundation. The jobs that would have enabled the complainants to avoid the Friday night assembly line shift work requirement are often jobs in indirect labour or on the labour gang. These desirable jobs are naturally held by more senior people who see them as particularly desirable. I also discuss this point further below but in the meantime note that moving the complainants to other jobs would still require covering their absences from the gas tank jobs and the cost of accommodation might well still be significant because of the bumping.

The idea of having student workers replace the complainants is also demonstrated not to be an accommodation short of undue hardship for several reasons. First, the evidence is clear that there was a significant quality problem with students on the job. Second, the Union vigorously resisted the idea of hiring temporary or part-time workers because of the possible infringements on the rights of their regular workers; and third, there was a real concern that K14s would also claim this form of accommodation and that their situation could not fairly be differentiated from that of the complainants.

Concerns about displacing the rights of older workers with seniority permeate the Company's consideration of other forms of accommodation such as placing the complainants on straight days in indirect labour or labour gang positions or having them work Sundays in place of their Friday night shifts. The seniority question is taken very seriously by the Union and by the Company because of the protection it gives to senior employees. Assembly line work is difficult work which over time leaves many workers with medical difficulties and restrictions. Indeed, the suggestion that the complainants could receive a more favourable job placement, as if they were K14s, under article 15.29 raised the spectre of them being displaced by workers with greater seniority with their own medical disabilities. This in turn would implicate the grievance procedure under the collective agreement and the handicap provisions of the Human Rights Code itself.

The complainants also suggested that they be allowed to work until sunset on Friday nights and then permitted to go home. This actually happened on at least two occasions and the complainants were allowed to leave without being disciplined. However, none of the real problems encountered by the Company concerning Friday night absenteeism would be clearly alleviated by this sort of accommodation because the Company would not know what other absences it had to deal with and would still need to have workers available to cover the complainants' jobs during the rest of the shift.

During his testimony, Mr. Weller was asked by counsel for the Company whether he would wish any other workers' seniority rights to be compromised or denied in order to accommodate his situation. His response was that he did not wish anybody's seniority rights to be compromised just as he did not wish his own rights to be compromised. Unfortunately, there is a clash between the complainants' religious needs and the prospects for accommodating those needs under the terms of the collective agreement between the respondent Company and the respondent Union. The Commission argues that, whereas the term "reasonable accommodation" has been used to describe the employer's duty to accommodate, the operative test for determining if an accommodation is precluded is where it is shown to cause "undue hardship" and not mere reasonableness. However, the concept of reasonableness is necessary to establishing what Mr.

Justice McIntyre in O'Malley described as "some realistic limit" upon the employer's duty of accommodation. To quote him again:

> The duty in the case of adverse effect discrimination on the basis of religion or creed is to take reasonable steps to accommodate the complainant, short of undue hardship: in other words, to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer. (page 555)

The complainants were excellent workers in important jobs on an assembly line that is a highly complex and interdependent operation. Their request was to be relieved of all work on the one shift that already experienced the highest absenteeism and for which manpower problems were the greatest. The Company did not reject the complainants' request for accommodation without considering the matter but the Commission argues that their process of deliberation was inadequate because it did not fully explore all the possibilities. In the circumstances, however, I find that the Company did what it reasonably could according to the test established by the Supreme Court of Canada in O'Malley and confirmed in Renaud. The Company's evidence on its ability to accommodate and the circumstances relevant to its determination of that ability, is virtually uncontradicted and given its substantive reasons for not accommodating, I believe the Company's method of deliberation on the request for accommodation was sufficient. The circumstances constraining the Company were sufficiently apparent that detailed enquiry into the possibilities of accommodation was unnecessary.

As the O'Malley case makes clear, the determination of undue hardship is made on a case by case basis. In my view, on the basis of the evidence before me, this case is unlike any others that have been decided. In particular, the other cases such as Gohm, described in detail above, have not involved the real prospect of imposing obligations on co-workers or detracting from their rights.

I also consider that my role in determining whether the Company stands to suffer undue hardship through undue interference in the operation of its business does not extend to re-evaluating its legitimate business decisions and strategies.

According to the O'Malley decision, I am to construe and flexibly apply the Code to "protect the right of the employee who is subject to discrimination and also to protect the right of the employer to proceed with the lawful conduct of his business" (pp.552-553). Having found that the Ford Motor Company's emphasis on quality is a result of a legitimate business strategy, it is not up to me to determine whether I think that emphasis is warranted.

X. HAS THE UNION DISCHARGED ITS DUTY OF ACCOMMODATION

Where, as here, a prima facie case of adverse effect discrimination has been made out, the respondent Union is under a similar duty to take substantial steps to accommodate the complainants short of undue hardship. This duty is contemporaneous with the employer's duty and, whereas it is certainly possible that the Union might be found not to have fulfilled its duty even where the employer has been found to have done so, that is not the case here. I find that in the circumstances, as described above, the Union took the steps to accommodate the complainants that should be required of it short of undue hardship.

From the beginning, the Union's representatives, Davey Hall in particular, met regularly with the complainants and with representatives of the Company in an attempt to seek some form of accommodation. I note in passing that the complainants themselves were not active members of the Union and did not avail themselves of the opportunity of addressing the general membership of the Union at a meeting especially called to consider their concerns. I do not find that the complainants failed to discharge any duty incumbent upon them by deciding not to appear but I simply note on the evidence that the Union representatives were generally sympathetic to the complainants and worked on their behalf within the limits established by the circumstances. For example, Union representatives were vigilant in pursuing leaves of absence for the complainants and in insisting that no discipline could be imposed for Friday night absence unless the supervisor notified the absent complainant on the following Monday that the absence had been unauthorized. However, it is clear that in the absence of the Company's willingness to excuse the complainants' unauthorized absences on Friday nights, the Union was not willing to seek an accommodation that would have violated the collective agreement.

In the Alberta Dairy Pool case, Madame Justice Wilson identified disruption of a collective agreement as a relevant factor in determining what constitutes undue hardship. In the Supreme Court of Canada decision in Lavigne v. Ontario Public Service Employees Union, [1991 2 S.C.R. 211] Madame Justice Wilson identified the importance of seniority to union members. In that case, Mr. Lavigne was not a member of the union but was required to pay union dues, some of which in his view were used for other than collective bargaining activities. He objected to the use of his dues for political initiatives that he might not agree with and brought a case under the Canada Charter of Rights and Freedoms based on the alleged infringement of his freedom of association and freedom of expression. Madame Justice Wilson found that Lavigne's freedom of association had not been violated and found that even a prima facie violation would have been saved by section 1 because of the value in having strong unions represent their employees in collective bargaining relationships. At page 296 she said the following:

> Additionally, as I have also mentioned, collective bargaining is a mechanism by which individual employees come together and form a union to represent their interests. The whole purpose of unionization is to strengthen the position of these employees in order to offset the countervailing power of employers. Rather than simply enacting legislation aimed solely at protecting individual workers by curtailing and controlling employer abuses... government established our current regime of collective bargaining. The purpose of this system is also to curb the excesses of the common law of the employment relationship and to thereby assuage industrial tensions. This is achieved, not through legislative protectionism but rather through the promotion of the self-advancement of working people. Thus, these two systems differ in respect of the mechanisms they adopt to achieve their ends, but both individual employment law and collective employment law aimed to advance the interests of a vulnerable group, the individual employees.

Mr. Lavigne wished to be given the special right to opt out because his constitutional rights had been infringed. Mr. Justice La Forest, at page 337, noted that "the ability to opt out would undermine the spirit of solidarity which is so important to the emotional and symbolic underpinnings of unionism." I see a useful and instructive analogy in the Lavigne decision's recognition, in a constitutional context, of the need to pressure the interests protected through the collective bargaining mechanism.

It is clear that the mere fact of being bound by a collective agreement does not enable the parties to it to avoid their responsibilities under the Ontario Human Rights Code. However, the disruption to the Union's hard-won position

under the collective agreement is a relevant factor to be considered in determining whether it has discharged its responsibility to accommodate up to the point of undue hardship. The Union, like the employer, was well aware of the circumstances which confronted the complainants need to have every Friday night off in order to observe their Sabbath. They were equally aware of the tension created by the problems of absenteeism on the Friday night shift and the prevailing view that Friday night work was undesirable both because it came at the end of a long work week and because of the dislocation caused by the absenteeism problem. The morale problems which these factors caused for the unionized work force added to the tension already caused by the need for the Oakville Assembly Plant to enhance its competitive position in order to survive. The plant was old with many workers of high seniority and a substantive number of workers with medical restrictions. In this context, the Union's emphasis on upholding the terms of the collective agreement is understandable and, in my view, it sufficiently explains the Union's unwillingness to grieve on behalf of the complainants when it fairly concluded that the collective agreement did not provide for a reasonable possibility of such grievances succeeding. Without repeating the several rationales, set out above, that apply equally to the Company and the Union, I conclude that the Union's efforts satisfied the requirements, in the context of its collective bargaining relationship with the Company, of seeking the accommodation of the complainants to the limits of undue hardship.

Accordingly, I am in the unenviable position of finding that the complainants, who impressed me as gentleman, genuine believers and fine workers, cannot succeed in their complaints against either the Company or the Union.

Dated at London, Ontario this 14th day of July, 1995

Peter P. Mercer
Board of Inquiry